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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-417

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

VS.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit

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Dated: September 12, 1978

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. Congress did not grant the Board Jurisdiction to regulate the intrastate fares of interstate carriers	10
II. The Court of Appeals has extended the authority of the *Shreveport* case beyond its applicability by failing to strictly interpret the need for a finding of unjust discrimination	13
III. The Board acted arbitrarily and against the public interest in its remedy	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

	Pages
Houston, East & West Texas Railway Company v. United States, 234 U.S. 342 (1914)	6, 7, 8, 10, 11, 12, 13, 14
North Carolina v. United States, 325 U.S. 507 (1945)	13, 14
People v. Western Airlines, Inc. 268 P.2d 723 (1954), *cert. den.*, sub. nom. Western Airlines, Inc. v. People of the State of California 348 U.S. 859	7, 10, 13
Railroad Commission of Wisconsin v. Chicago B & O. R.R., 257 U.S. 563 (1922)	14
Texas Aeronautics Commission v. Braniff Airways, Inc., et al., 454 S.W.2d 199 (1970), *cert. den.* 400 U.S. 943	10
Transcontinental Bus System v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. den.*, 390 U.S. 920 (1968)	11

Civil Aeronautics Board Cases

Interstate and Intrastate Fares in California and Texas Markets, CAB Decision, Order 76-7-23 (decided July 7, 1976)	1, 2, 4, 6, 15

TABLE OF CONTENTS

	Pages
Codes	
Public Utilities Code of the State of California:	
Section 461.5	9
Section 2739 et seq.	3
Constitution	
United States Constitution, Article I, Section 8, Clause 3	6
Statutes	
28 U.S.C. § 1254(1)	2
Federal Aviation Act of 1958:	
Section 101 (49 U.S.C. § 1301)	10
Section 101(10) (49 U.S.C. § 1301(10))	3
Section 101(21) (49 U.S.C. § 1301(21))	3
Section 101(22) (49 U.S.C. § 1301(22))	3
Section 101(23) (49 U.S.C. § 1301(23))	3
Section 102 (49 U.S.C. § 1302)	3
Section 404(b) (49 U.S.C. § 1374(b))	3, 4, 6, 10, 11, 15
Section 411	3
Section 1006(f), 49 U.S.C. § 1486(f)	2
Interstate Commerce Act:	
Section 1 (49 U.S.C. § 1)	12
Section 3 (49 U.S.C. § 3)	11, 12
Section 3(1) (49 U.S.C. § 3(1))	11

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Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California) pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1978.

OPINIONS BELOW

The judgment of the Court of Appeals is printed in Appendix A. The opinion of the Court of Appeals is not yet reported and is printed in Appendix B. The Civil Aero-

nautics Board's Opinion and Order No. 76-7-23 decided July 7, 1976 and its Order on Reconsideration, No. 76-10-138 decided October 29, 1976 in Docket 24779, *Interstate and Intrastate Fares In California and Texas Markets,* are not yet reported and are printed in Appendices C and D, respectively. The Board's Order 72-9-90, *Order of Investigation in Docket 24779,* issued September 25, 1972 is not yet reported and is printed in Appendix E. The Initial Decision of Administrative Law Judge William H. Dapper, served on April 23, 1974, is printed in Appendix F. The Board's Order No. 75-3-2 of March 3, 1975 granting discretionary review of the Initial Decision is printed in Appendix G. The Board's *Order Granting Partial Stay,* No. 77-1-137, issued January 24, 1977 and its *Order Modifying Partial Stay,* No. 77-4-22, issued April 5, 1977 are not yet reported and are printed in Appendices H and I, respectively.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Sec. 1006(f) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Sec. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has exceeded its jurisdiction by ousting state agencies from economic regulation of intrastate air travel provided by Board certificated air carriers.

2. Whether the Civil Aeronautics Board's Orders are without the requisite findings, are arbitrary and capricious, and conflict with the public interest.

[1] The Appendices cited herein are separately bound and are jointly submitted by these Petitioners and by Petitioners, the National Association of Regulatory Utility Commissioners.

STATUTORY PROVISIONS INVOLVED

Involved are Sections 101(10), 101(21), 101(22), 101(23), 102 and 404(b) of the Federal Aviation Act of 1958 as amended, 49 U.S.C. Sections 1301(10), 1301(21), 1301(22), 1301(23), 1302 and 1374(b). These provisions are set forth in Appendix J.

STATEMENT OF THE CASE

The Public Utilities Commission of the State of California is the agency in the State of California charged with the responsibility, *inter alia,* of regulating transportation by air in common carriage within the State of California. Public Utilities Code of the State of California, Section 2739, *et seq.*

On September 28, 1971, in Docket 23859, Ralph Nader and the Aviation Consumer Action Project (ACAP) filed a complaint with the Civil Aeronautics Board (Board) alleging that the differences between the interstate and intrastate fares charged by United Air Lines (United) in the Los Angeles-San Francisco market were unjustly discriminatory against interstate passengers.[2] The complaint sought both civil and criminal sanctions against United for failing to file its intrastate tariffs with the Board and for violating Sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended.

The Board issued Order 72-9-90 on September 25, 1972 which dismissed the complaint and opened an investigation to determine whether the differences between intra-

[2] United also had two separate interstate fares, a jet coach and a jet commuter fare for its interstate passengers. The initial decision of the Administrative Law Judge found this practice to be unjustly discriminatory and ordered it stopped. No party complained of this ruling and hence it was not further considered by the Board. The Board was only concerned with the difference in rates between the intrastate established fares and the Board established fares.

state fares and interstate fares charged by certain federally certificated carriers between intra-California markets and between certain intra-Texas markets are unjustly discriminatory against interstate passengers or otherwise unlawful and, if so, should an order be made to correct the situation. In its Order 72-9-90 the Board stated at page 2:

> "... United is not required to file its intrastate tariffs with the Board because transportation thereunder is not 'air transportation' as defined in the Act [Federal Aviation Act of 1958 as amended]. (See Sections 403(a), 101(10) and 101(21).)"

A hearing was held before an Administrative Law Judge who issued an initial decision on April 23, 1974. The initial decision found that the differences between fares charged interstate and intrastate passengers on intrastate flights were not unjustly discriminatory as they were justified by transportation related factors. Thus the initial decision did not reach the question of whether the Board has the legal power to assert jurisdiction over the intrastate fares of interstate carriers.

In Order 75-3-2 adopted March 3, 1975, the Board granted review of the Administrative Law Judge's Initial Decision as to the issue of whether the California and Texas intrastate fares, in the markets in question, result in unjust discrimination against interstate passengers. The Board in its opinion and order 76-7-23[3] concluded, however, that unjust discrimination within the meaning of subsection 404(b) of the Federal Aviation Act of 1958, as amended, (49 U.S.C. Sec. 1374(b)) was established as between "knowledgeable" and "unknowledgeable" interstate stopover passengers.[4] It was

[3] See CAB Order 76-7-23, issued July 7, 1976, mimeo at pages 4-7. (Appendix C pages 23-28.)

[4] Interstate stopover passengers are defined by the Board as those passengers making brief stops at one or more points en route on an interstate flight, such as a passenger traveling from Seattle, Washington to Los Angeles, California, who might wish to spend a period in San Francisco before continuing to his destination. While the so-called "stopover" passenger is the interstate traveler who is the cornerstone of the Board's orders, it is questionable that this person is in interstate travel at all once he has broken his interstate flight. California has taken the position, and continues to take the position, that the traveler is an intrastate passenger for the intrastate segment of his trip.

reasoned that the so-called knowledgeable interstate stopover traveler would take advantage of the lower intrastate fare over intrastate segments of his interstate trip while the unknowledgeable stopover interstate traveler would simply purchase one through ticket at the interstate rate for his journey.

The remedy established by the Board to eliminate the discrimination found to exist between the knowledgeable and unknowledgeable interstate stopover passengers was to order federally certificated carriers to establish the same fares for passengers moving in either intrastate or interstate transportation between the same points in the same class of service. Thus the carriers were ordered to supersede their intrastate tariffs with tariffs in accordance with Board Order 74-12-109 in *The Domestic Passenger Fare Investigation* (Docket 21866, *et al.*). The order provided, however, that such fares may be lowered to the extent necessary to meet the competition from intrastate carriers.

The Board concluded that by ordering federally certificated carriers to charge only interstate fares to all passengers whether they are interstate or intrastate passengers is no assertion of its authority under the Federal Aviation Act to control the intrastate rates of federally certificated carriers or intrastate carriers as such. It was merely eliminating unjust discrimination between various interstate passengers.

Petitions for reconsideration were filed, including a joint petition by the National Association of Regulatory Utility Commissioners (NARUC) and California.

On October 29, 1976, in Order 76-10-138, the Board denied the petitions for reconsideration.[5]

California, NARUC and the Texas Aeronautics Commission filed petitions for review with the United States Court of Appeals for the District of Columbia Circuit in Dockets Nos. 76-2117, 76-2123 and 76-2155 respectively.

The Court of Appeals, by opinion issued June 20, 1978 upheld the orders of the Board under review. The Court of Appeals, taking a broader view of the case than the Board stated that its review concerned the authority granted the Board by statute and delegated to it by the Congress under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution. The Court of Appeals, in a cursory statement, found that the Board had sufficient evidence to conclude that there was unjust discrimination. The Court of Appeals then found that the Board had authority to eliminate this unjust discrimination by preempting the intrastate fares in issue, the Board's authority being grounded in the Federal Aviation Act, Section 404(b) (49 U.S.C., Sec. 1374(b)) with reliance on the Supreme Court's decision in *Houston, East & West Texas Railway Company v. United States*, 234 U.S. 342 (1914) (Shreveport Case.). The Court of Appeals found that the Federal Aviation Act was modeled after the Interstate Commerce Act and therefore the *Shreveport* doctrine gave the Board authority to preempt an intrastate rate structure when unjust discrimination against the interstate passenger is found. The Court of Appeals further found that the remedy mandated by the Board, the elimination of the lower intrastate rates, was not arbitrary.

[5] On December 30, 1976, California petitioned the Board to stay Order 76-7-23 and Order 76-10-138 pending judicial review of those orders. By Order 77-1-137, adopted on January 24, 1977, the Board granted partial stay of Order 76-7-23 and modified the stay by Order 77-4-22.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals erroneously allows to stand Board orders that represent an extension of its economic regulatory jurisdiction far beyond the boundaries prescribed in the Federal Aviation Act of 1958. In effect, the Board has illegally assumed continuing jurisdiction over the intrastate rates of federally-certificated carriers in California as well as Texas intrastate markets.[6] Although the Board disclaimed any authority over intrastate fares, the orders in question will accomplish the result of having federally certificated carriers file their intrastate tariffs with the Board for approval.

The decision of the court below is based on an incorrect application and extension of the Federal Aviation Act of 1958 as well as an erroneous interpretation of the Congressional intent in passing that Act. The Court of Appeals also incorrectly applied the Supreme Court's decision in the *Shreveport* case and ignored other major decisions which have limited the Board's jurisdiction including *People v. Western Airlines, Inc.* 268 P.2d 723, (1954) *cert. den.*, sub. nom. *Western Airlines, Inc. v. People of the State of California* 348 U.S. 859. The jurisdiction and power of the Board can be no greater than that which Congress has conferred upon it. Congress explicitly limited the Board to the regulation of interstate, overseas, or foreign air transportation and in fact has consistently rejected extension of Board economic regulation of intrastate travel.

[6] Other states such as Florida, Pennsylvania and Nevada have varying degrees of intrastate air transportation regulation that appear to be affected by this new Board policy.

The Court of Appeals additionally based its decision on the erroneous assumption that the Board had found a "Shreveport-type" unjust discrimination in this case. It clearly had not. The *Shreveport* case involved an unlawful burden on interstate commerce because a preference was given to intrastate commerce against interstate commerce. In the instant case the California intrastate air fares are lawful and part of the comprehensive scheme of economic regulation of intrastate air transportation. The Federal Aviation Act of 1958 allows for such a dual fare structure and this was explicitly recognized by the Board in its orders. The Board did not make the prerequisite and critical finding of unjust discrimination between intrastate and interstate passengers. What the Board did conclude is that there is unjust discrimination only between "knowledgeable" and "unknowledgeable" interstate stopover travelers. This arises when certain interstate passengers make improper use of intrastate fares; clearly a matter of enforcement of interstate rate tariffs.

In order to correct this dubious discrimination problem, the Board has chosen a course of action that creates unnecessary conflict with air transportation regulation in California that has been in effect for over 25 years and causes grave economic consequences to the California air traveler. The immediate effect of the Board's orders will be a substantial increase in intrastate fares on intra-California monopoly routes served exclusively by federally certificated carriers. This is estimated to cost California air travelers approximately $3 million per year in added air fares.[7] In some instances these orders create prohibitive fare increases for intra-California travelers. The orders in issue have numerous long

[7] This figure results from applications filed by interstate carriers with California to increase intrastate fares in compliance with the Board's orders.

range consequences, moreover, which the Board failed to consider. The Board failed to examine the economic impact on rural California communities served by Board certified monopoly carriers. The subject orders also create conflict with California statutes. For example, California Public Utilities Code Section 461.5 prohibits carriers from charging more for a shorthaul than a longhaul over the same route in the same direction. In many instances where a federally certificated carrier competes with an intrastate carrier over an entire route but is a monopoly carrier over only a part of the route in California it is caught between the conflicting State and Board regulations. Most importantly, the Board's orders unnecessarily upset a long-standing competitive check and balance between the intrastate and federally certificated carriers. Currently, the federally certificated carriers have intrastate fares between 42 California city pairs that are lower than the fares of the California certified carriers operating between the same city pairs. Both categories of carriers have historically taken the initiative to lower fares to be competitive. Under the Board's orders, the federally certificated carriers must increase their intrastate fares and can only lower them to *meet* fares as established by intrastate carriers.[8] All competitive incentive, therefore, has been destroyed in this one set of orders.

In the usual course of events, a decision eliminating alleged unjust discrimination is hailed as a consumer-oriented victory. However, in the present case, such an outcome will not occur. What will ultimately occur is that all passengers, on federally certificated carriers, intrastate and interstate, will pay a higher fare for the same service they are now receiving.

[8] The effect of the raising of the fares on these routes by interstate carriers to meet intrastate carrier fares is estimated as an additional $9 million per year for California air travelers.

I. Congress did not grant the Board Jurisdiction to regulate the intrastate fares of interstate carriers.

The Court of Appeals erred in finding that Congress, in passing the Federal Aviation Act of 1958, gave the Board the same authority as is found in the Interstate Commerce Act to regulate intrastate rates and hence the Court of Appeals erred in finding that the *Shreveport* case is applicable to the Federal Aviation Act of 1958.

There is no question that Congress has the authority to preempt intrastate regulation. However, when a comparison is made of the Federal Aviation Act of 1958 and the Interstate Commerce Act it becomes clear that Congress did not grant the same broad authority in both acts. The lengthy definitions in Section 101 of the Federal Aviation Act (49 U.S.C. Sec. 1301) clearly limits the Board to the regulation of interstate air transportation. (See Appendix J.) It can hardly be argued that the Congress, after going to such lengths to define the parameters of the Board's jurisdiction in terms of carriage by aircraft across state lines, did not intend by such definitions to exclude Board jurisdiction over intrastate air transportation. The section of the Act in issue in this case, Section 404(b) (49 U.S.C. 1374(b)), is totally confined to the regulation of rates for interstate, overseas, foreign or mail transportation. (See Appendix J.) There is no indication that Board jurisdiction would lie in regard to intrastate rates even as those rates might relate to interstate rates. These statutory limitations placed on Federal authority to regulate intrastate airline concerns have been long recognized by the courts. In *Texas Aeronautics Commission v. Braniff Airways, Inc., et al,* 454 S.W.2d 199 (1970), *cert. den.* 400 U.S. 943 and *People v. Western Airlines, Inc.,* 268 P.2d 723 (1954) *cert. den.* 348 U.S. 859, the Texas and California Supreme Courts found that Congress has not sought to extend the economic regulation of the Board to intrastate air transportation.

The Court of Appeals, in analyzing *Shreveport,* reasoned that the Interstate Commerce Act did not extend regulation to intrastate commerce. However, the Supreme Court found that when unjust discrimination arises from the relation of intrastate to interstate rates, Congress is competent to deal with it. The Court of Appeals went on to state that the Federal Aviation Act of 1958 was modeled after the Interstate Commerce Act citing *Transcontinental Bus System v. CAB,* 383 F.2d 466 (5th Cir. 1967), *cert. den.,* 390 U.S. 920 (1968). However, this case as well as other cited cases on this subject do not deal at all with the exercise of *Shreveport*-type authority over intrastate rates. They are strictly interstate rate cases. In fact, the language of the Federal Aviation Act of 1958 is much more restrictive than the Interstate Commerce Act. Further, the Court in *Shreveport* gave much more weight to the actual wording of the Interstate Commerce Act as the basis for sustaining preemption authority than the Court of Appeals below recognized.

In *Shreveport,* the Supreme Court said that the grant of authority given by Congress to the Interstate Commerce Commission was evidenced by Section 3(1) of the Interstate Commerce Act (49 U.S.C. Sec. 3(1)). Section 3 of the Interstate Commerce Act pertains to "any common carrier subject to the provisions of this chapter". (See Appendix K.) However, Section 404(b) of the Federal Aviation Act of 1958, pertaining to rate discrimination, refers only to "air transportation". This, as stated previously, is defined as interstate, overseas, or foreign air transportation or the transportation of mail by aircraft. No such limitation to "interstate, overseas or foreign transportation is found in the wording of Section 3(1) of the Interstate Commerce Act. The Board, as opposed to the Interstate Commerce Commission, has not been given authority to be the arbiter over the relationships between interstate and intrastate fares. In the *Shreveport* case, the Supreme Court was care-

ful to indicate the scope of the jurisdiction given the Interstate Commerce Commission by the Congress.

> "This language [Section 3 of the Interstate Commerce Act] is certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier."[9]

In the authority granted to the Board to remove unjust discrimination in fare structures there is a "qualification" which limits the Board's authority to that of regulating the relations between differing fares in interstate transportation only. Further, Section 1 of the Interstate Commerce Act, cited by the Court of Appeals below, specifically confers jurisdiction over the carrier itself. Additionally, as referenced above, the authority of the Interstate Commerce Commission to affect intrastate rates in *Shreveport* derives from Section 3 of the Interstate Commerce Act which applies to all common carriers with no restriction on the type of transportation involved (interstate or intrastate). In the Federal Aviation Act, however, Congress specifically limited the Board to regulation of interstate air transportation. There is no provision conferring general jurisdiction over air carriers similar to Sections 1 and 3 of the Interstate Commerce Act. The Federal Aviation Act is clearly meant to be less far-reaching.

The Court of Appeals additionally erred in its interpretation of the Congressional history of the Federal Aviation Act. The Court stated:

> "In addition, the legislative history of the Civil Aeronautics Act of 1938 indicate that Congress, although

[9] *Houston, East & West Texas Railway Company v. United States, supra,* 234 U.S. at 356.

> asked to do so, decided not to limit the application of the Shreveport doctrine in air transportation as it had done in highway transportation."

Just the opposite is true. The *Shreveport* case was decided in 1914. If Congress had intended to give the Board *Shreveport*-type authority to prescribe intrastate rates after a finding that existing intrastate rates unjustly discriminate against, or are an undue burden upon, interstate commerce it would have included in the Civil Aeronautics Act of 1938 or the Federal Aviation Act of 1958 some explicit provision to that effect. Congress has confirmed, at least several times, its original decision to divide the economic regulatory responsibilities over air transportation between state and federal authorities by refusing to amend the Acts to place all such responsibility in a federal body. (See *People v. Western Air Lines, Inc., supra,* fn. 4 at 737 which lists six separate congressional history references on this matter.)

II. The Court of Appeals has extended the authority of the Shreveport case beyond its applicability by failing to strictly interpret the need for a finding of unjust discrimination.

Assuming arguendo that the Board has *Shreveport* type authority, the Board in this case has not complied with the indispensable prerequisites to the exercise of such power. Intrastate transportation and rate setting are primarily the concern of the state. The power of the Interstate Commerce Commission as noted in the *Shreveport* case and those cases relying on the *Shreveport* case with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. A high standard of certainty must be met before the intrastate rates can be preempted by the interstate rates. *North Carolina v. United States,* 325 U.S. 507 (1945). As noted above in

this Petition, the Federal Aviation Act recognizes a dual air fare structure as does the Board. The Court of Appeals failed to recognize that the instant case does not involve a question of intrastate fares favoring intrastate persons or localities as was the issue in *Shreveport.* Nor does the case at issue involve any question of a non-compensatory intrastate fare as was the issue in the *Wisconsin Passenger Fare* case, also relied on by the Board.[10]

The Court of Appeals noted that there is a disparity between intrastate rates and interstate rates and further noted that the Board found an unjust discrimination between knowledgeable and unknowledgeable interstate stopover passengers. The Court of Appeals then made a critical error, however, by failing to distinguish between the two Board findings. (See page 8 of its mimeo decision Appendix B, page .....) The Board did not find that the intrastate rates were unjustly discriminatory. Thus the Court of Appeals has extended the *Shreveport* case to the point where any alleged problem in the interstate air transportation rate structure will justify the preemption of intrastate rates if there is a disparity between interstate and intrastate fares.

This interpretation is in error. Merely showing that the two rates are in disparity does not constitute unjust discrimination. *North Carolina v. United States, supra,* at 512, 514. The Board here has not shown nor even alleged that the rate differentials involved here cause an undue or unjust burden on interstate commerce. This must be shown under *Shreveport.* Here the Board created the victim of the alleged discrimination. The Board found unjust discrimination among various interstate passengers. The Orders in question are not based

[10] *Railroad Commission of Wisconsin v. Chicago B & O. R.R.*, 257 U.S. 563 (1922).

on the fact that intrastate passengers as a group unjustly pay a lower fare as compared with the higher fare paid by all interstate passengers. What the Board did was to arbitrarily preempt intrastate rate jurisdiction to resolve a relatively minor interstate rate tariff problem. This action was erroneously sanctioned by the Court of Appeals.

III. The Board acted arbitrarily and against the public interest in its remedy.

The Board's *Order of Investigation* raised the primary issue of whether the differences between the fares charged to intrastate passengers and the fares charged to interstate stopover passengers were unjustly discriminatory. The decision of the Administrative Law Judge in this case analyzed at great length the difference and concluded that the difference is not unjustly discriminatory pursuant to Section 404(b) of the Federal Aviation Act of 1958. Yet without prior notice to the parties the Board in its Order 76-7-23 did not focus its review on this issue at all, but rather raised the issue of discrimination existing between knowledgeable and unknowledgeable *interstate* stopover passengers. This theory was not tested at the evidentiary hearing and no input was received on how to deal with this alleged discrimination. Yet the Board arbitrarily and without consideration for the public interest took the extreme measure of preempting intrastate rate regulation with the inherent conflicts caused thereby. The harm done to the traveling public in California and California intrastate air transportation regulation including higher fares, discrimination against rural monopoly markets, conflict with intrastate regulation and disruption of competition have been previously addressed.

If discrimination between knowledgeable interstate passengers who buy two separate tickets for their journey and

unknowledgeable interstate passengers who purchase one through ticket actually exists there are many ways to remedy the problem short of preemption. The Board considered none of these, choosing instead to summarily dismiss consideration of other approaches as too difficult to enforce. The basis for this view cannot be understood as it was never tested in the case.

The Board could easily resolve this situation by requiring the airlines to make all passengers "knowledgeable" by informing them of their option to purchase a separate intrastate ticket and also informing them of the inconveniences involved such as the lack of through handling of baggage. The Board could also refuse to allow airlines to "double ticket" passengers. That is the practice of issuing a passenger an intrastate and interstate ticket at the same time for a through flight. The Board could further order interstate airlines to adopt state determined rates for all intrastate segments of air flights. In fact, the Board authorized this result in the orders in question, when competition exists with intrastate carriers. In short, numerous other solutions exist other than the total disruption of intrastate air transportation regulation through preemption.

CONCLUSION

It is respectfully submitted that by ousting California from economic regulation of intra-California air transportation on federally certificated carriers the Board has adversely affected intra-California air travelers in a way which Congress clearly did not authorize.

Because of the very important federal-state jurisdictional questions presented and the effects on California intrastate air transportation of the Board's orders, California respectfully submits that this petition for a writ

of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Dated: September 8, 1978.

Respectfully submitted,

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Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.

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PETITIONERS' JOINT APPENDICES

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PETITIONERS' JOINT APPENDICES

TABLE OF CONTENTS

	Page
Appendix A Judgment of the Court of Appeals for the District of Columbia Circuit	2
Appendix B Decision of the Court of Appeals for the District of Columbia Circuit	4
Appendix C CAB Opinion and Order 76-7-23 issued July 7, 1976	17
Appendix D CAB Opinion and Order 76-10-138 issued October 29, 1976	39
Appendix E CAB Order of Investigation 72-9-90 issued September 25, 1972	49
Appendix F Initial Decision of Administrative Law Judge served April 23, 1974	57
Appendix G CAB Order 75-3-2 issued March 3, 1975	105
Appendix H CAB Order Granting Partial Stay, 77-1-137 issued January 24, 1977	109
Appendix I CAB Order Modifying Partial Stay, 77-4-22 issued April 5, 1977	113
Appendix J Federal Aviation Act of 1958, as amended, 49 U.S.C. Sections 1301(10), 1301(21), 1301(23), 1302, 1371, 1373, 1374 (b)	115
Appendix K Interstate Commerce Act, 49 U.S.C. Sections 1, 3(1)	131

APPENDIX A

Judgment of the Court of Appeals
for the District of Columbia Circuit

United States Court of Appeals
For the District of Columbia Circuit

No. 76-2117 September Term, 1977

The People of the State of California
and the Public Utilities Commission of
the State of California, Petitioners
v.
Civil Aeronautics Board, Respondent
Western Airlines, Inc.
Texas International Airlines, Inc.
Ralph Nader and the Aviation Consumer
Action Project
United Air Lines, Inc.
Hughes Air Corporation, d/b/a
Hughes Airwest, Intervenors

76-2123

National Association of Regulatory
Utility Commissioners, Petitioner
v.
Civil Aeronautics Board, Respondent
Texas International Airlines, Inc.
Western Airlines, Inc.
Ralph Nader and the Aviation Consumer
Action Project
United Air Lines, Inc.
Trans World Airlines, Inc.
Hughes Air Corporation, d/b/a
Hughes Airwest, Intervenors

76-2155

Texas Aeronautics Commission, Petitioner
v.
Civil Aeronautics Board, Respondent
Texas International Airlines, Inc.
Western Airlines, Inc.
Ralph Nader and the Aviation Consumer
Action Project
Trans World Airlines, Inc.
United Air Lines, Inc.
Hughes Air Corporation, d/b/a
Hughes Airwest, Intervenors

[Filed June 20, 1978]

Petition for Review of An Order
of the Civil Aeronautics Board
Before: WRIGHT, Chief Judge, BAZELON and WILKEY,
Circuit Judges

JUDGMENT

These causes came on to be heard on a petition for review of an order of the Civil Aeronautics Board and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Civil Aeronautics Board under review herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
GEORGE A. FISHER
Clerk

Date: June 20, 1978
Opinion for the Court filed by Circuit Judge Wilkey

APPENDIX B

Decision of the Court of Appeals for the District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
For the District of Columbia Circuit

No. 76-2117

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

WESTERN AIRLINES, INC.
TEXAS INTERNATIONAL AIRLINES, INC.
RALPH NADER AND THE
AVIATION CONSUMER ACTION PROJECT
UNITED AIR LINES, INC.
HUGHES AIR CORPORATION, d/b/a
HUGHES AIRWEST, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 76-2123

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

TEXAS INTERNATIONAL AIRLINES, INC.
WESTERN AIRLINES, INC.
RALPH NADER AND THE
AVIATION CONSUMER ACTION PROJECT
UNITED AIR LINES, INC.
TRANS WORLD AIRLINES, INC.
HUGHES AIR CORPORATION, d/b/a
HUGHES AIRWEST, INTERVENORS

No. 76-2155

TEXAS AERONAUTICS COMMISSION, PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

TEXAS INTERNATIONAL AIRLINES, INC.
WESTERN AIRLINES, INC.
RALPH NADER AND THE
AVIATION CONSUMER ACTION PROJECT
TRANS WORLD AIRLINES, INC.
UNITED AIR LINES, INC.
HUGHES AIR CORPORATION, d/b/a
HUGHES AIRWEST, INTERVENORS

Petition for Review of Orders of the
Civil Aeronautics Board

Argued 17 February 1978

Decided 20 June 1978

Rufus G. Thayer, Jr. with whom *J. Calvin Simpson* was on the brief, for petitioner in No. 76-2117. Also *Richard D. Gravelle* entered an appearance for petitioner in No. 76-2117.

William R. Nusbaum with whom *Paul Rodgers* was on the brief, for petitioner in No. 76-2123.

John L. Hill, Attorney General of Texas and *David Hughes,* Assistant Attorney General were on the brief, for petitioner in No. 76-2155.

Alan R. Demby, Attorney, Civil Aeronautics Board with whom *James C. Schultz,* General Counsel and *Jerome Nelson,* Deputy General Counsel, Civil Aeronautics Board, *Glen M. Bendixsen,* Associate General Counsel and *Robert L. Tooney,* Attorney, Department of Justice were on the brief, for respondents.

Reuben B. Robertson, III with whom *Alan B. Morrison* was on the brief, for intervenor, Ralph Nader and the Aviation Consumer Action Project.

Michael A. Katz, Arnold T. Aikens and *Peter D. Connally* were on the brief, for intervenor United Air Lines.

Richard A. Fitzgerald, David L. Vaughan and *John W. Simpson* were on the brief, for intervenor, Hughes Airwest.

Ralph B. Jordan and *Dennis A. Barlow* and *Robert E. Moock* were on the brief, for *Amicus Curiae,* City of Kern and City of Visalia.

Also *Emory N. Ellis, Jr.* entered an appearance for intervenors, Western Air Lines and Texas International Airlines, Inc.

Also *Edmund E. Harvey* entered an appearance for intervenor, Trans World Airlines, Inc., in No. 76-2123 only.

Also *Robert B. Nicholson* and *James F. Ponsoldt,* Attorney, Department of Justice entered appearances in Nos. 76-2123 and 76-2155.

Before: WRIGHT, *Chief Judge,* BAZELON and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Presented for our review is an order of the Civil Aeronautics Board (Board) in which lawful fares were set for the transportation, by air carriers operating under Board certification, of interstate and intrastate passengers in the intra-California and intra-Texas markets. Dual economic regulation by federal and state agencies have produced a conflict. In a broader sense, our review concerns the authority granted the Board by statute and delegated to it by the Congress under the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution.

I. BACKGROUND

The Public Utilities Commission of the State of California (CPUC) and the Texas Aeronautics Commission (TAC) are state regulatory agencies which license intrastate air carriers. In California intrastate fares are set by PUC regulation, but in Texas competitive forces operate to establish the fare structure without state regulation at the present time. In both of these states fares have been in effect for intrastate air transportation which are lower than those set by the Board for interstate transportation.

Under the authority granted it by the Federal Aviation Act[1] the Board authorizes air carriers and regulates the fares they charge for air transportation in interstate carriage, as defined in §§ 1301(10) and (21)(a) of the Federal Aviation Act.[2] Interstate transportation includes carriage between two or more points within a state when it is part of a longer journey commencing from or destined to another state. It is obvious that air carriers transporting interstate traffic between points in a single state also carry interstate traffic.

The term "interstate carrier," as used in this opinion, refers to a carrier holding a certificate of public convenience and necessity issued by the Board authorizing it to engage in interstate air transportation.

Recognizing that fare differences existed between interstate and intrastate passage in the California and Texas markets, the Board instituted a formal investigation[3] on 25 September 1972 to determine whether unjust discrimination resulted from the fares charged by interstate carriers in violation of the Federal Aviation Act providing:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any

[1] 49 U.S.C. § 1301 *et seq.*

[2] 49 U.S.C. § 1301(10):

> Air transportation means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

49 U.S.C. § 1301(21):

> Interstate air transportation . . . mean the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . in commerce between, respectively—(a) a place in any State of the United States . . . and a place in any other State of the United States . . . .

[3] Docket 24779, Interstate and Intrastate Fares in California and Texas Markets.

> respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.[4]

The Initial Decision of the ALJ found that there were discriminatory differences between the interstate and intrastate fares but viewed the discrimination as justified because of the need of the interstate carriers to compete with intrastate carriers in the local markets. The need to compete was caused by the revenue losses the interstate carriers would suffer otherwise. The conclusion reached in the Initial Decision was that the discrimination was not unjust.

The Board reversed the Initial Decision in determining that there were no significant differences in costs incurred and services rendered, that passengers were intermingled, and that knowledgeable interstate passengers, through "double ticketing," were paying the lower intrastate fares for travel which was actually interstate. In the opinion of the Board these factors amounted to unjust discrimination, because all passengers were not treated equally.

The Board concluded that only by eliminating the fare differentials could a remedy be achieved. It reasoned that while two levels of fares remained in effect, no proper safeguard could be found, as the intent of the passenger had to be revealed to the carrier to determine which level was authorized. The availability of lower fares would obviously create a reason for interstate passengers not to reveal their travel plans. Accordingly, the Board ordered interstate carriers to charge fares at rate levels which have been established for operations throughout their domestic systems generally, such fares

[4] 49 U.S.C. § 1374(b).

to be "constructed in accordance with the Board's prior decisions in the *Domestic Passenger-Fare Investigation*, Dockets 21866, et al.,[5] except that such fares may be lowered to the extent necessary to meet the competition from intrastate carriers."[6]

In taking this action the Board relied upon the Supreme Court's *Shreveport* decision[7] interpreting the then-existing Section 3 of the Interstate Commerce Act as conferring power on the Interstate Commerce Commission to regulate intrastate rates in order to eliminate unjust discrimination against interstate movements, 49 U.S.C. § 1374(b) of the Federal Aviation Act having been patterned after Section 3 of the Interstate Commerce Act.

The question before this court is whether the Board's order was in excess of its statutory authority, unsupported by substantial evidence, or arbitrary and capricious.[8]

II. Analysis of Issues

A. *Unjust Discrimination*

We must initially determine whether there was substantial evidence for a finding of unjust discrimination because of a dual fare level between interstate and intrastate passengers traveling on interstate carriers.[9]

It is clear from the record that all passengers received the same services, which were provided at the same costs, and that interstate and intrastate passengers were inter-

[5]In this proceeding, which considered all aspects of interstate fares in the forty-eight contiguous states, the Board adopted principles by which interstate fares are established.

[6]Board Opinion, Docket 24779, 8 July 1976.

[7]*Houston, East & West Texas Railway Company* v. *United States*, 234 U.S. 342 (1914).

[8]5 U.S.C. § 706.

[9]49 U.S.C. § 1486(e).

mingled. It is also clear that some interstate passengers, who have been termed "knowledgeable" because they were aware of the dual fare structure, had made a practice of purchasing separately the intrastate portion of their passage. The effect is that intrastate passengers and knowledgeable interstate passengers were traveling within California and Texas at lower fares than all other interstate passengers. On the basis of the record, there was substantial evidence upon which the Board could find unjust discrimination, and we uphold that finding.

B. *Authority to Eliminate Unjust Discrimination*

We move next to the question of whether the Board exceeded its authority in establishing a single fare level applicable to both interstate and intrastate passengers traveling on interstate carriers.

Petitioners attack the Board decision by claiming that the Board has usurped the power of a state to control air commerce strictly within its borders and ousted the state agencies from economic regulation of intrastate fares. The argument runs that, in the absence of a specific grant of authority to the Board, a state is free to regulate commerce within its confines. The Board order has the effect of regulating intrastate fares, a right reserved to the state and one which the Federal Aviation Act does not grant to the Board. On certain noncompetitive, or monopoly, routes in California served only by *inter*state carriers, the *intra*state fares will be replaced with fares at the interstate level. Predictions are made of an adverse economic impact on the isolated communities served by monopoly routes, in that the higher cost of air travel will discourage passengers, effecting locality discrimination. With the termination of control by CPUC, the

California passenger will lose the right to participate in determining the reasonableness of rates.

The Board asserts its authority to eliminate unjust discrimination by setting a single fare level is grounded in the Federal Aviation Act, *supra*, § 1374(b), and relies upon the Supreme Court's landmark decision in *Shreveport Rate Case.*[10]

In *Shreveport* interstate carriers were applying freight rates established by a Texas state regulatory commission which were at a lower rate for eastbound and intrastate shipments than for westbound shipments from Shreveport, Louisiana, into Texas. The then-existing Section 3 of the Interstate Commerce Act[11] provided that it was unlawful for a common carrier to give undue preference to a particular locality. The court held that Congress possesses the power to regulate and protect interstate commerce even though intrastate transactions may be controlled thereby. It went on to say:

> It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard.... Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by in-

[10] Note 7, *supra.*

[11] Interstate Commerce Act Sec. 3:
That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

> terstate carriers which will obstruct the freedom of movement of interstate traffic. . . . Having this power, Congress could provide for its execution through the aid of a subordinate body. . . .[12]

The *Shreveport* opinion concluded that although Section 1 provided that the Interstate Commerce Act did not extend to intrastate transportation, when unjust discrimination arises from the relation of intrastate to interstate rates, Congress is competent to deal with it.

The *Shreveport Rate Case* doctrine has been followed consistently in the ensuing years; *Illinois Central R.R. Co.* v. *Public Utilities Commission,*[13] *Wickard* v. *Filburn,*[14] and courts have repeatedly held that Section 137(b) of the Federal Aviation Act was modeled after the Interstate Commerce Act, the latter being an appropriate guide for construing the former, *Transcontinental Bus System* v. *CAB.*[15] In addition, the legislative history of the Civil Aeronautics Act of 1938 indicates that Congress, although asked to do so, decided not to limit the application of the Shreveport doctrine in air transportation as it had done in highway transportation.

The provisions of the statutory schemes of the Interstate Commerce Act and Federal Aviation Act limit the federal agencies to the regulation of interstate commerce but when unjust discrimination results from an intrastate rate structure, the federal power preempts that of

[12] Note 7, *supra,* at 355.

[13] 245 U.S. 493 (1918).

[14] 317 U.S. 111 (1942).

[15] 383 F.2d 466, 480 (5th Cir. 1967), *cert. denied,* 390 U.S. 920 (1968). *See also Commonwealth of Virginia* v. *CAB,* 498 F.2d 129, 143 (4th Cir. 1974); *Flying Tiger Line* v. *CAB,* 121 U.S. App. D.C. 332, 350 F.2d 462 (1965).

the state.[16] The separation of interstate and intrastate passengers on interstate carriers was not possible in any practical manner.

The court upholds the Board's authority to eliminate unjust discrimination by setting a single fare level to apply to both interstate and intrastate passengers on interstate carriers.

C. *The Remedy*

Applying a single fare to all travelers, the Board eliminated the cause of the unjust discrimination. The petitioners contend that the application of the higher interstate rather than the lower intrastate fare was arbitrary, so we next examine the evidence and the rationale on which it was based.

The rate level set is particularly important in the monopoly markets of California, which, because they are served only by interstate carriers, will have an increased

[16] *American Public Gas Ass'n, et al.* v. *Federal Energy Regulatory Comm.*, —— U.S. App. D.C. ——, —— F.2d ——, No. 75-2105, 10 May 1978, holding that § 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b), does not authorize the regulation of sales of natural gas in intrastate commerce, is distinguishable. That provision, like § 1374(b) of the Federal Aviation Act, note 4, *supra*, is limited by its terms to discriminatory practices in interstate commerce. However, a comparison of the legislative histories of the two statutes shows that the committees of Congress considered and rejected a limitation to the Federal Aviation Act which would have prohibited the Commission from exercising power over interstate rates. (Hearings before Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess., 1937, on S. 2, pp. 519-20; Hearings before Committee on Interstate and Foreign Commerce, House of Repr., 75th Cong., 1st Sess., H.R. 5234 & H.R. 4652, p. 405.) The intent of Congress during consideration of the Natural Gas Act was clearly shown to be that of not disturbing the then existing jurisdiction of the States. (House Rept. 709, 6586, 75th Cong., 1st Sess., pp. 1-2.)

fare level.[17] Presumably the competitive forces on the other routes in California and on the Texas routes will operate to maintain a lower fare level, in accordance with the exception made in the Board's order.[18]

Cost evidence was not made a part of the proceeding before the Board, but the ALJ early in the proceeding ruled that basic costs would be determined by the principles established in the *Domestic Passenger Fare Investigation* (DPFI). The *DPFI* principles set a rate-cost ratio which all interstate carriers have been required to apply nationwide. This was done in a very extensive rate proceeding to accomplish the objectives of (1) permitting the carrier to obtain a fair return on investment and (2) insuring that the cost of uneconomic operations are borne by the carrier and not by the passenger. The resulting fares are neither unreasonably high nor uneconomically low, and since the ratio is applied equally, no passenger is subsidizing another passenger in another market.

Neither the Federal Aviation Act nor court decisions require an individual rate inquiry in each investigative proceeding. The *Shreveport* decision affirmed the power of Congress, here delegated to the Board, to maintain its own standard on rates.

[17] Recognition was made in the Initial Decision of the Administrative Law Judge of the existence of fare differentials in the intrastate monopoly markets where no effective competition was present, a differential which was caused either by a direct order from CPUC or because after the Board had approved a carrier's interstate tariff, approval of the intrastate fare had to be obtained from CPUC. (I.D. 29).

While the Board opinion does not mention consideration of the monopoly market situation, this was developed in the Initial Decision, which was adopted by the Board subject to the sole exception of inconsistency with a finding of unjust discrimination. In summation, the Board knew and considered the effects of charging higher interstate fares on intrastate monopoly routes.

[18] We were informed at oral argument that the lower intrastate fare had been filed by all carriers on all competitive routes.

It was logical, therefore, for the Board to rely on the *DPFI* principle for setting fares in these proceedings as being fully within its authority.

Petitioners and the amicus curiae have labeled as locality discrimination the application of interstate fares in the monopoly markets which serve isolated parts of California. The interstate fares to be charged in the monopoly markets will correspond to the nationwide fare scheme, treating all passengers equally. When consideration is given to the nationwide equality in the fare structure, the argument lacks force.[19]

The Board's order permitting interstate carriers, as an exception to nationwide equality, to reduce fares on competitive routes in Texas and California follows established precedent, since competition has long been recognized as a justification for reducing fares.[20]

Conclusion

We find that the Board's decision was rational and based upon substantial evidence. The Civil Aeronautics Board is empowered by Congress to preempt state regulatory agencies in interstate commerce and accordingly the decision of the Board is

Affirmed.

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[19] We note that Hughes Airwest receives a subsidy of approximately $9 million per year for serving the isolated communities of California. Hughes Airwest brief, p. 37. Obviously if Hughes Airwest is permitted to charge the higher interstate rate, the federal subsidy will be lessened.

[20] *See, e.g., Barringer & Co.* v. *United States,* 319 U.S. 1, 13 (1943); *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627, 636-37 (1933); *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344, 352-53 (1940); *Board of Trade* v. *United States,* 314 U.S. 534, 546 (1942).

APPENDIX C

CAB Opinion and Order 76-7-23 Issued July 7, 1976

United States of America
Civil Aeronautics Board
Washington, D.C.

Docket 24779

Interstate and Intrastate Fares
In California and Texas Markets

Decided: July 7, 1976

Found that:

Differences between intrastate fares and interstate fares charged by the federally certificated carriers party to this investigation in the intra-California and intra-Texas markets at issue herein are unjustly discriminatory.

The federally certificated carriers party to this investigation shall eliminate the unjust discriminations found by establishing the fares levels now or hereafter on file with the Board pursuant to section 403 of the Federal Aviation Act for interstate travel for the transportation of both interstate and intrastate passengers moving in the intra-California and intra-Texas markets at issue herein.

The lawful fares for the transportation of both interstate and intrastate passengers in intra-California and intra-Texas markets for the future shall be those constructed in accordance with the Board's prior decisions in the *Domestic Passenger-Fare Investigation,* Dockets 21866 *et al.,* except that such fares may be lowered to the extent necessary to meet the competition from intrastate carriers.

APPEARANCES:

As listed in the initial decision, and, in addition:

Alexander J. Moody, for United Air Lines, Inc.
Henry M. deButts, for Western Air Lines, Inc.

OPINION

BY THE BOARD:

This proceeding was initiated by Order 72-9-90, which instituted an investigation to determine whether the differences between interstate fares and intrastate fares charged by federally certificated air carriers in intra-California and certain intra-Texas markets[1] are or will be unjustly discriminatory, unduly preferential or prejudicial or otherwise unlawful, in violation of subsection 404(b) of the Federal Aviation Act of 1958, as amended.[2] The investigation was also intended to determine whether any unlawfulness resulted from the differences between, on the one hand, interstate coach of standard-class fares in the above identified markets and, on the other hand, the interstate commuter or economy-class fares in those same markets.

After public hearings, Administrative Law Judge William H. Dapper issued an Initial Decision concluding that while the differences between the interstate and intrastate fares in these markets did not violate subsection 404(b) of the Act, the differences between the interstate coach or

[1]The specified markets were Dallas-Houston, Dallas-San Antonio, and Houston-San Antonio.

[2]The subsection reads as follows:

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

standard-class fares and the interstate commuter or economy-class fares were unjustly discriminatory. Judge Dapper also concluded that neither of the above-described fare differences were unduly preferential or prejudicial or were otherwise unlawful under the Act. In Order 75-3-2, the Board stayed Judge Dapper's initial decision, took review of it, and ordered further proceedings on the sole issue of whether the differences between the interstate and the intrastate fares charged by the federally certificated carriers in these markets are unjustly discriminatory, unduly preferential or prejudicial or otherwise unlawful. We found that further proceedings were not necessary on the issue of whether the differences between the interstate coach (or standard) class fares and the interstate commuter (or economy) class fares created unjust discriminations, since our determinations on these fares had been enunciated in our decisions in the *Domestic Passenger-Fare Investigation, Phase 9, (Fare Structure),* Docket 21866-9, embodied in Orders 74-3-82 and 74-12-109. Thus, we adopted the Initial Decision to the extent it is not inconsistent with our Phase 9 decisions and found that compliance with those decisions would adequately implement our findings, rather than requiring the cancellation of one or the other of the two fares, as Judge Dapper had ordered.

Following the issuance of Order 75-3-2, briefs and reply briefs were filed,[3] oral argument from 12 parties was heard

[3]Briefs were filed by the Bureau of Economics (the Bureau), the People of the State of California and the Public Utilities Commission of the State of California (California PUC), Continental Air Lines, Inc. (Continental), Hughes Air Corp., d/b/a Hughes Airwest (Airwest), Ralph Nader and the Aviation Consumer Action Project (collectively ACAP), the National Association of Regulatory Utility Commissioners (NARUC) and United Air Lines, Inc. (United). Braniff Airways, Inc. (Braniff), Western Air Lines, Inc. (Western), Texas International Airlines, Inc. (TI), Trans World Airlines, Inc. (TWA) and the Texas Aeronautics Commission relied on their briefs to Judge Dapper as briefs to the Board. Reply briefs

by the Board[4] and the case stands submitted for decision. The Bureau and ACAP oppose the Initial Decision on the issue under review. The federally certificated carriers, the California PUC, and NARUC all support the Judge's determination that the differences between the federally certificated carriers interstate and intrastate rates between the same pairs of intrastate points, and their use in the manner disclosed by the record, are not unjustly discriminatory. Two of the carriers reiterate their views to the Board, previously rejected by the Judge, that the Board should effect a more pervasive control of the intrastate rates of the federal carriers or of the rates of the intrastate carriers.

Upon careful consideration of the entire record, the presentations of the parties and the Initial Decision, the Board has concluded and finds that the differences between the interstate and intrastate rates of the federally certificated carriers, and their use as disclosed by the record, are unjustly discriminatory in contravention of section 404(b) of the Act. We shall remedy this breach of the statutory mandate by ordering the carriers to establish a single fare applicable to all passengers for each city-pair market. We shall provide that the single fare shall be established on the same basis as the carriers' other interstate fares, except that the fare may be lowered to the extent necessary to meet the competition of intrastate carriers. In reaching

were filed by the Bureau, Airwest, NARUC, United, ACAP and the California PUC. Western's motion to waive the 50-page limitation for its brief, and the Texas Aeronautics Commission's motion to allow receipt of its brief out of time, both of which are unopposed, will be granted.

[4]Beaumont-Port Arthur originally contended that the intrastate and interstate rates over the Texas segments in question were unduly prejudicial to it and unduly advantageous to Houston and San Antonio if justified, and, if not, were burdensome to interstate commerce. However, they did not participate in the proceedings on review.

this result we have departed from the conclusion reached by the Judge. Nevertheless, except to the extent that his findings and conclusions are inconsistent with the findings and conclusions expressed herein, we adopt as our own the findings and conclusions of the Judge as set forth in the Initial Decision, a copy of which is attached hereto as an appendix.

As limited by Order 75-3-2, this proceeding on review concerns only the lawfulness of the difference in the two sets of fares—one intended for interstate traffic and the other for intrastate traffic—assessed in the California and Texas markets at issue by the air carriers certificated by the Board. These two levels of fares are in effect (particularly in California) because the carriers (1) must establish lower fares to meet the competition of the intrastate carriers, and (2) are subjected to both State and Federal regulation in the same city-pair markets.[5] The record reveals that travelers moving between points within California are charged significantly higher fares in many markets if their tickets indicate that the intrastate flight is part of an overall journey which includes travel across State lines. The same situation has existed (and apparently now exists, albeit to a lesser degree) in Texas.[6] Those passengers whose tickets do not show prior

[5]California PUC contends that it has not compelled interstate carriers to meet the competition of intrastate carriers for intrastate passengers (PUC Br., p. 2; PUC Rep. Br. p. 8; Tr. 144). However, Airwest points out that in 400 airport pair markets listed by it, 360 showed interstate-intrastate fare differentials, only three of which were voluntary. Much of the problem arises from regulatory lag. (Airwest Br., pp. 12-15).

[6]At the time this investigation was instituted, fare differentials existed in all three of the identified Texas markets. Order 72-9-90, mimeo., at p. 5. Subsequently the federally certificated carriers withdrew their intrastate fares. Initial Decision at pp. 19-20. More recently, however, intrastate differentials have been reinstated by at least one federally certificated carrier operating in the San Antonio-Houston market. See note 14, *infra*, and accompanying

or subsequent interstate air transportation, on the other hand, are charged lower fares. The differences between the two levels of fares are quite significant: at the time of the hearing in this proceeding, the intrastate fare for travel between Los Angeles and San Francisco was 21.7 percent lower than the comparable interstate fare in the same market.[7] At the present time, differences remain substantial, as the following three examples demonstrate:[8]

	Burbank-San Francisco	Los Angeles, San Diego	San Antonio-Houston
Intrastate	$25.50	$12.25	$15.00
Interstate	$30.00	$23.00	$31.00

Passengers moving in interstate commerce making local trips within these two States fall within two categories. The first category consists of stopover passengers, *i.e.*, those passengers making brief stops at one or more points en route, such as a passenger traveling from Seattle, Washington, to Los Angeles, California, who might wish to spend a period in San Francisco before continuing to his destination. The second category includes through connecting passengers whose fares are either through fares (for those making on-line connections) or joint fares (for passengers making interline connections). Fares for the second category of passengers—both on-line and interline—will usually be lower

text. In any event, the issue of the lawfulness of such differentials in the intra-Texas markets is not moot, since the federally certificated carriers operating in the intra-Texas markets can reestablish them at will.

[7] Initial Decision, at pp. 20-21 and Exhibit BE-D-101, cited therein, showing differences ranging as high as 40 to 50 percent in some markets.

[8] *Official Airline Guide*, June 1, 1976. Fares are for one-way travel, tax included, economy class.

than fares computed by combining the local interstate fares charged by the Board-certificated carriers transporting them to and from the transfer point, although the possibility may exist that they might be higher than a combination of fares utilizing the local intrastate fare for the intrastate fare for the intrastate portion of the trip and the interstate fare for the balance.[9]

For purposes of our decision in this case it is only necessary to concern ourselves with stopover passengers, and whether the dual fare structure is unjustly discriminatory as applied to them. Certainly, there are no significantly different costs or service benefits associated with the two levels of fares. Passengers paying the higher interstate fares are intermingled with passengers paying the lower intrastate fares on the same flights and receive the same basic services and amenities.[10] The justification for the differences rather lies in the historic definition of interstate commerce, which distinguishes an entirely intrastate journey from a trip, also physically intrastate, which is actually a portion of a longer journey involving

[9] Not only is this possibility somewhat remote (depending upon the length of the trip and the interstate competition) but the through passenger, in order to take advantage of any possible saving, would be forced to purchase two tickets, one on each side of the connecting point, and transfer his baggage himself at the connecting point.

[10] This has been conceded by most of the carrier parties from the outset. See Information Responses BI-I-1; AA-IR-8; CO-I-2; DL-60-IR: NAL-IR-7; RW-I-2; TXIA-IR-3; UA-IR-6 and WA-IR-13. While interstate stopover passengers utilizing the lower intrastate fare would have to retrieve and recheck their baggage, and might have to purchase their tickets in two separate transactions (which they probably would wish to do for overnight stopovers in any event), neither of these differences involve cost savings which are of sufficient significance to justify the fare differentials. Carriers do not generally allow discounts to passengers who have no baggage to check, nor charge more if a passenger utilized two tickets rather than one ticket with separate coupons.

one or more movements across State lines.[11] Thus, for example, if a businessman living and working in Houston, Texas, decides while in Houston to meet first with a customer in Dallas and then with another customer in Chicago before returning to his home in Houston, he should in theory pay the interstate fare for the first leg of his journey, the trip between Houston and Dallas. If, on the other hand, he decides to travel on to Chicago only after he arrives in Dallas, he is moving in intrastate commerce on the first leg of his journey and should pay the intrastate fare for that same Houston-Dallas trip. The distinction lies in the intent of the traveler, determined before the commencement of the journey.

While the theoretical distinction between intrastate and interstate commerce presents no conceptual difficulties, the application of the distinction has proved to be accompanied by grave deficiencies in view of the actual workings of the market place. The carriers have no way of knowing a passenger's underlying intent insofar as the passenger reveals it during the ticketing process, and it is obvious from the record here that a great many interstate passengers are not disclosing the entirety of their travel plans. Hence they are paying the lower intrastate fares for travel which is in fact interstate.[12] Some carriers have indicated that they will even sell a separate ticket at the intrastate fare level for the intrastate leg of a journey to a passenger purchasing other interstate air transportation, if the passenger so demands.[13] Another carrier simply charged all local passengers the lower intrastate fare during the period in which it published such a fare.[14] It is thus apparent that the more knowledgeable interstate passengers moving in these markets are routinely paying the lower intrastate fares, leaving only those interstate travelers who are unaware of the lower fares (or that they can be obtained simply by pressuring the carrier or by making the reservation for the intrastate leg of the journey separately) to pay the higher fares.[15] There is, of course, no way to determine the precise proportion of the interstate travelers who are using the intrastate fares.[16] But it is clear, and we find, that the number is substantial rather than *de minimis*.

We believe that the availability and use of the two differing fare levels under these circumstances clearly creates unjust discriminations within the meaning of subsection

[11] The traditional test, adopted from *Sprout* v. *South Bend*, 277 U.S. 163, 168 (1928) by the Board in *Eastern Air Lines, Inc. Enforcement Proceeding*, 40 C.A.B. 745, 747 (1964) is that "... the destination which was intended by the passenger when he begins the journey and which was known to the carrier and for which he purchased a ticket determines the character of the trip." As *Baltimore & O.S.W. R.R.* v. *Settle*, 260 U.S. 166, 171 (1922) makes clear, however, the movement is interstate, given the requisite intent, whether or not that intent is communicated to the carrier or is reflected in the itinerary stated on the ticket.

[12] For example, counsel for Braniff admitted at oral argument that "many, many passengers are now using double ticketing . . .," (Tr. at 6), and counsel for Continental and Airwest made similar statements (Tr. at 10, 26). United conceded in its testimony that "some passengers" utilize double ticketing to avoid paying the higher fare. UA-DT-1, p. 2. What is perhaps more significant is that no party has argued that the practice does not exist. Those whose legal arguments require that factual premise simply ignore the situation. Additionally, the information responses of other carriers suggest that the carriers realize that the passenger tickets often may not reflect complete itineraries. See, e.g., TXIA-IR-4; NAL-IR-9, p. 1; UA-DT-1, p. 2.

[13] See Exhibits CO-I-2, p. 3, CO-I-4, pp. 1-2; CO-I-7, p. 3; and DL-80-IR, p. 1.

[14] See comments by counsel for TI at oral argument. (Tr. at 32, 35).

[15] It is hardly surprising that this is so, since the intrastate fares are published in the *Official Airline Guide*, and travel agents as well as frequent travelers would be aware of them in making travel plans.

[16] The carriers traffic reports reflect ticketed itineraries, not actual itineraries.

404(b) of the Act. Unjust discriminations within the meaning of that subsection occur whenever a carrier affords different treatment to like traffic for like and contemporaneous service under substantially similar circumstances and conditions.[17] We do not differ completely with Judge Dapper's conclusions that the fare differences are substantial, the traffic is "like," and the services offered are "like and contemporaneous." However, since interstate travelers are paying both levels of fares, the question here is not whether unjust discrimination would exist if those paying the higher fares indeed had different origins or destinations (and hence were given "unlike" service) from those paying the lower fares. It has proven to be impossible to restrict the lower fare to those in fact intending to travel and traveling only within one State, and both the lower and the higher fares are being paid by passengers receiving the same service in interstate commerce.[18]

The Initial Decision concludes that while discrimination has been established, unjust discrimination within the meaning of section 404(b) has not, because the circumstances and conditions surrounding the use of the differing fares are not substantially similar; the competition of the intrastate carriers in the local markets and the dual regulatory

[17] *Transcontinental Bus System, Inc.* v. *Civil Aeronautics Board,* 383 F.2d 466, 481 (5th Cir., 1967), *cert. denied,* 390 U.S. 920 (1968); *Domestic Passenger-Fare Investigation, Phase 5—Discount Fares,* Order 72-12-18, at p. 60; *Summer Excursion Fares,* 11 C.A.B. 218, 222-23 (1950).

[18] We thus do not find it necessary to decide whether the different "legal status" of the two classes of travelers (interstate stopover and solely intrastate, or through and local) would render the services they receive "unlike" and hence not unjustly discriminatory. Additionally, since both favored and disadvantaged passengers are moving in air transportation subject to our jurisdiction, we need not reach the question, discussed in the *Pan American Ferry Flight Case,* 18 C.A.B. 214 (1953), whether unjust discriminations can be created by providing special privileges outside the scope of air transportation.

policies arising from the local authorities, particularly the California PUC, render the circumstances under which the differing fares are used dissimilar, and justify the discriminations established between interstate and intrastate passengers in local markets. It is at this point that we depart from the judgment expressed in the Initial Decision.

In most cases when carriers are faced with intense price competition for a significant class of traffic it is generally not unlawful to meet that competition by reducing rates only for that class of traffic.[19] This is what the federally certificated carriers have done to compete for intrastate traffic in these markets. The difficulty here, however, is that the carriers do not limit the fare reduction to traffic that is truly intrastate in nature. Rather, because the carriers are unable or unwilling to distinguish all interstate passengers moving over the intrastate segments, some are charged the high interstate fares for the intrastate segment while others are charged the lower intrastate fares. The most significant factor in the determination as to whether the interstate traveler pays the higher or lower fare is the extent of his knowledge with respect to the existence of the dual fare structure and the spread therein.[20] To the extent that the traveler is fully informed he is

[19] The use of specific commodity rates is illustrative of this practice.

[20] No party has argued that "less knowledgeable" and "more knowledgeable" passengers constitute groups justifiably receiving different treatment. Those carriers seeking to preserve the *status quo,* primarily stress, apart from jurisdictional arguments, the revenue loss, amounting to about $10 million per year in these markets (BE-D-104, p. 1) which would result from elimination of the differentials. Any business corporation engaging in price discrimination obviously believes that revenues are thereby maximized. But the very purpose of subsection 404(b) is to prohibit unjust discriminations despite the fact that "the carrier may benefit therefrom." *Tour Basing Fares,* 14 C.A.B. 257, 258-59 (1951).

likely to be charged the lower fare while without such information he is likely to be charged the higher fare.

This practice violates the very essence of the prohibition against unjust discrimination, which is intended to insure that all passengers are treated equally, and that limited groups of persons do not receive a more favorable price than others purchasing the same service. *Transcontinental Bus System, Inc.* v. *Civil Aeronautics Board,* 383 F.2d 466 (5 Cir., 1967), *cert. denied,* 390 U.S. 920 (1968); *Trailways of New England, Inc.* v. *Civil Aeronautics Board,* 412 F.2d (1st Cir., 1969). While *Transcontinental Bus* and *Trailways* both involved instances in which the carriers had specifically designated the favored class of persons in their tariffs, the rule against unjust discrimination applies equally where the proscribed discrimination arises from the effect of carriers' practices. This has been the established interpretation of the prohibitions against unjust discrimination and other forms of favoritism under the Interstate Commerce Act (*New Haven and H.R.R.* v. *Interstate Commerce Commission,* 200 U.S. 361, 398 (1906); *Union Pacific R.R.* v. *United States,* 313 U.S. 450, 462 (1941)), whose provisions were the source of the language used in our statute.[21]

Nor can directives issued by State agencies operate to compel the maintenance of rate discriminations, even though such directives purport to affect only intrastate traffic. In *Houston and Texas Ry.* v. *United States,* 234 U.S. 342 (1915), well-known as the *Shreveport* case, the Supreme Court interpreted the then-existing section 3 of the Interstate Commerce Act[22] as conferring ample power

[21] *Military-Tender Investigation,* 28 C.A.B. 902, 919-920 (1959).

[22] Act to Regulate Commerce, § 3, 24 Stat. 380. As it then existed, section 3 was markedly similar to the present subsection 404(b) of our Act: "Section 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 3, of course, does not specifically refer to "discrimination." That was dealt with in section 2. Section 404(b) of our Act deals with preference, prejudice, and discrimination. The historical basis for competition becoming a justification for preference, prejudice, or discrimination is traced with lucidity in *Transcontinental Bus System, Inc.* v. *C.A.B.,* 383 F.2d 466, 482-483 (5th Cir., 1967), *cert. denied,* 390 U.S. 920 (1968).

on the Interstate Commerce Commission to require interstate carriers subject to its jurisdiction to establish and maintain levels of intrastate rates found necessary to eliminate unjust discrimination against interstate movements. The *Shreveport* doctrine is, of course, now well-established in the law.[23] Moreover, the Supreme Court long ago recognized the applicability of the *Shreveport* principle to a situation much like this one. In *Wisconsin Railroad Commission* v. *Chicago, B. & O. R.R.,* 257 U.S. 563 (1922) (the *Wisconsin Passenger Fares Case*) the Court upheld an order of the Interstate Commerce Commission entered under section 13(4) of the Interstate Commerce Act directing rail carriers to increase their intrastate passenger fares to higher levels which had been established for interstate travelers generally. There, as here, both categories of passengers were being transported on the same equipment and were in all other respects being given the same services. 257 U.S. at 565. There, again as in this case, some interstate travelers utilized the lower intrastate fares through the expedient of purchasing separate tickets at points within the State. 257 U.S. at 566.

[23] See, *e.g., Wickard* v. *Filburn,* 317 U.S. 111, 123 (1942) and cases cited therein. Contrary to assertions made here, the Transportation Act of 1920 did not abrogate the *Shreveport* doctrine, but rather added to the Commission's existing power (over unjust discrimination caused by relationships between specific intrastate and interstate rates) the power to regulate all of a carrier's intrastate rates if those rates were so low as to create a burden on the carrier's overall operations.

The Commission's decision under review was based on a completely different principle than that relevant to this proceeding, of course, since the concern there was with the undue burden on interstate commerce arising from purely intrastate operations, which the Commission had recently been empowered to remedy by the expansion of its authority embodied in section 416 of the Transportation Act of 1920, 41 Stat. 484, adding section 13(4) to the Interstate Commerce Act. What is significant for the purpose of this proceeding, however, is the specific recognition of the Court in the *Wisconsin Passenger Fares* case that to the extent that unjust discriminations against interstate commerce were created by specific interstate-intrastate fare relationships, the Commission's order was properly grounded on the principles previously established in the *Shreveport* decision alone. 257 U.S. at 579-80. Since all the federally certificated carriers' flights at issue here are open to both interstate and intrastate passengers,[24] and hence unjust discriminations exist as to each of the carriers' operations, the *Shreveport* doctrine, as interpreted in *Wisconsin Railroad Commission* case, compels the result we have reached in this case. This case involved no "purely intrastate" segments, which reflects the fact that the national air transportation system is predominantly interstate in nature.[25]

[24]Judge Dapper found that, overall, almost 50% of the federally certificated carriers' intra-California passengers paid the interstate fare. The percentage varies widely from market to market, of course, but at least 10% of the passengers in even the smaller California markets are interstate passengers. See Information Response RW-I-7. Of course, not all of these passengers are interstate stopover passengers. Although the data are less reliable, it appears that 40% to 60% of the intra-Texas travelers carried by the federally certificated carriers in which fare differentials existed paid the interstate fare in 1972. See Information Responses BI-I-5, TXIA-IR 2. See also note 31, *infra*.

[25]Approximately 8% of the 1974 domestic passengers reported by the federally certificated carriers had origins and destinations at points within one State. *Domestic Origin-Destination Survey, 4th QTR. 1974*, Vol. VII-4-1, Table 6 (5.52% of the top 1000 city-pairs, which themselves included 70.59% of total reported traffic).

Having concluded that the practice of charging differing levels of fares in the markets under consideration creates unjust discriminations against interstate passengers, we must next address the question of what order should be addressed to the federally certificated carriers to eliminate these unjust discriminations. After carefully reviewing the facts of record, the contentions of the parties, and the scope of the proceeding we have concluded that these discriminations can be corrected only by eliminating the fare differentials themselves. No party has suggested, and we have not upon our own consideration been able to devise, any safeguard which will suffice to prevent the utilization of the lower intrastate fares by knowledgeable interstate passengers, so long as the two levels of fares remain in effect.[26] The "continuing intent" of the passenger as to whether an interstate journey has been undertaken is a subjective factor which can be known with certainty only by the passenger himself. And the widespread knowledge of the availability of the lower fares in these markets will continue to give the knowledgeable passengers ample reason not to reveal the full extent of their travel plans. Thus our order to be entered in this proceeding will require the carriers to establish the same fares for the transportation of passengers moving in intrastate commerce as those which they

[26]Continental, while initially urging that the dual fare structure here is not unjustly discriminatory, did propose, as a solution to the discrimination giving rise to this case while preserving competition been the interstate and intrastate carriers, that the public be given an "informed choice." This would be accomplished by requiring the ticketing carrier to inform stopover passengers and through connecting passengers of the lower intrastate fare and permitting them to choose between it and the higher interstate fare with through ticketing and baggage handling (Continental, Br. pp. 10-13). The difficulty with this solution is that it knowingly leads to the treatment of interstate trips as intrastate trips, contrary to fact. Continental modified its presentation and opted for the Bureau's position at oral argument (Tr. 14), which is similar to the position we have adopted.

charge for the transportation of passengers moving in interstate commerce between the same points in the same class of service, in accordance with their tariffs filed pursuant to section 403 of the Act.[27]

It has been argued that we lack the power to compel federally certificated carriers to charge fares for intrastate transportation at levels other than those authorized by the appropriate State authorities.[28] This argument, however, was also rejected in *Shreveport* itself. There, in responding to the contention that the Interstate Commerce Commission lacked the power to enter an order which "relieved the appellants [rail carriers] from further obligation to observe . . . intrastate rates . . .," 234 U.S. at 359, the Court said that:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is the essence of this power that, where it exists, it dominates.
>
> * * *
>
> Whenever the interstate and intrastate transactions of carriers are so related that the government of one involves the control over the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule . . ." 234 U.S. at 350-52.

The Court then concluded that Congress, in enacting section 3 of the Act to Regulate Commerce, had intended that all unjust discriminations affecting interstate commerce should be corrected by the Commission, notwithstanding

[27] 49 U.S.C. § 1373.

[28] See, *e.g.*, Brief of United, at pp. 6-9. The argument is inapposite in that it refers to "purely" intrastate fares, whereas here we are concerned with fares which are called "intrastate" but are in fact being used both in interstate and intrastate commerce.

any "requirements of the local authorities which are assumed to be binding on the carriers." 234 U.S. at 359. See also the Board's earlier discussion of the *Wisconsin Passenger Fares* case.

The Board's decision here is no assertion of an authority under the Act to control the intrastate rates of federally certificated carriers, or intrastate carriers, as such. We are cognizant of the many cases cited to us to the contrary.[29] But our determination here does not seek to control such intrastate fares but simply carries out the mandate of the Act to eliminate unjust discrimination in air transportation. This we are empowered to do. And in doing so we do not deprive the local authorities, such as the California PUC and the Texas Aeronautics Commission, of the right to exercise such powers as they have within the scope of the established constitutional scheme governing Federal-State relationships in this area.

Our decision that the fares for the transportation of intrastate passengers should not differ from those established for interstate passengers does not, of course, in and of itself determine what the lawful levels of the interstate fares should be for the future. On this latter subject, we conclude that in the absence of competitive factors affecting particular markets, the levels of the federally certificated carriers' rates should not differ from those established for operations throughout their domestic systems

[29] Illustrative are *People* v. *Western Air Lines, Inc.*, 268 P.2d 723 (1954), appeal dismissed for lack of a substantial Federal question in *Western Air Lines, Inc.* v. *People State of California*, 348 U.S. 859 (1954), and *Texas International Airlines* v. *C.A.B.*, 473 F.2d 1150 (D.C. Cir., 1972). See also Order 72-9-90, instituting the investigation in this case.

generally.[30] The costs of rendering service in particular markets or in general are not at issue in this proceeding. Moreover, the interstate fares now in effect are those which have arisen from lengthy proceedings in which we thoroughly examined the structure of such fares. There is no reason advanced for covering the same ground again in the present circumstances. As indicated earlier, however, we recognize the competitive pressures resulting from the presence of intrastate carriers in many of the markets at issue in this proceeding, and it would be unreasonable to expect the federally certificated carriers to compete effectively with the intrastate carriers for intrastate traffic if they were required to charge their interstate formula fares. Moreover, the record demonstrates that support which the federally certificated carriers derive from this traffic benefits the carriers, and, as well, both the intrastate and interstate passengers moving in these markets.[31] Because of the detrimental financial effects that would follow from the federally certificated carriers' inability to participate in this traffic, it is clearly in the public interest to allow them to maintain competitive fares so as to continue their participation. If they wish to do so, however, they must charge lower fares to *all* of their passengers, intrastate and interstate alike, to avoid the discrimination proscribed herein.[32]

[30] It has been argued that the absence of cost evidence in this proceeding precludes the issuance of an order pursuant to section 1002(d) correcting the unjust discrimination here found. We disagree. Early in the course of this proceeding, the judge ruled that basic costs were to be determined for this case in the then-pending *Domestic Passenger-Fare Investigation* (*Prehearing Conference Report,* at p. 3; *Supplemental Prehearing Conference Report and Ruling on Motion,* at pp. 3-4) and we agree with this determination. Orders in unjust discrimination cases have in many instances required cancellation of tariffs containing "discount" fares upon a finding of unjust discrimination without a separate reexamination of the costs underlying the "normal" fare thus effectively reinstated. See, *e.g., Domestic Passenger-Fare Investigation—Phase 5 (Discount Fares),* Order 72-12-18; *Tour Basing Fares,* 14 C.A.B. 257, 262 (1951). Having determined not to establish rates based on the separately established costs for each of these markets (or upon average intrastate costs), requiring a "replay" of the entirety of the *Domestic Passenger-Fare Investigation* in this proceeding to obtain new nationwide cost figures would serve no useful purpose.

[31] TWA, for example, stated that all flights now serving intra-California markets continue on to points in other States and/or foreign countries. TW-D-10. United also noted that intrastate travelers provide economic support for flights designed to serve interstate markets as well as intra-California markets. U-DT-1, p. 7. Over 60% of Western's flights in intra-California markets proceed to points in other States and/or foreign countries (WA-R-5), and the carrier claims that losing the ability to compete for intra-California passengers impairs its ability to operate interstate and international services. WA-R-T1, p. 1. All of National's intra-California flights extend to other States, since its authority is subject to a long-haul restriction, NAL-IR-1, p. 1. Losing the ability to carry local passengers in these markets would thus result in a much greater reduction in traffic than in seats available, which would in turn increase unit costs. The carriers in the intra-California markets estimated that requiring all fares to be established at the interstate levels would result in an annual revenue loss of $28 million in 1974 (BE-D-104, p. 1), which would not be offset by a corresponding decrease in expenses. On the other hand, the loss resulting from the dilution of fares by use of intrastate fares for the interstate passengers moving in intra-California markets would amount to approximately $10 million in 1974 (BE-D-104, p. 1).

In the interest of orderly implementation of our decision herein, we will defer the effectiveness thereof for a period of 90 days. This will permit carriers who wish to lower their fares to meet intrastate competition to file appropriate tariffs. Since the competitive impact of the intrastate carriers' operations may depend on such matters as whether the intrastate carriers operate between the same airports, the frequency of operation, the equipment utilized, and the like, we expect the carriers who file such tariffs to address all relevant questions in their accompanying justification. We will also require

[32] In instances where they choose to lower their fares to meet competition, however, we reject the Bureau's proposal to limit the scope of our order herein to the local fares charged to stopover passengers and to allow the normal interstate fares established pursuant to *Phase 9* of the *DPFI* to be used for fare construction purposes (as in the case of joint fares based on the sum of the local fares pursuant to the Board's decision in *Phase 4* of the *DPFI*). The Bureau's proposal would have the effect of leaving "a paper" fare

such tariff filings to be made on sixty days' notice. It should be pointed out that the situation with which this investigation has been concerned has been in effect for over twenty-five years. There have been no serious complaints (other than that giving rise to this investigation) from either the industry, the public, or other regulatory authorities, and the Board itself has been silent. Under the circumstances, and in light of the provisions of Section 102 of the Act and our authority under Section 1002, we shall make our determination herein with respect to the departure from Section 404(b) prospective in operation.

On the basis of the foregoing facts and considerations, the Board finds and concludes that the difference between the intrastate fares and the interstate fares charged by federally certificated air carriers in the intra-California and the intra-Texas markets at issue in this case are unjustly discriminatory within the meaning of Section 404(b) of the Act, and should be eliminated as provided herein.

An appropriate order shall be entered.

ROBSON, Chairman, O'MELIA, Vice Chairman, MINETTI and WEST, Members, concurred in the above opinion. JOHNSON, Member, did not participate.

for fare construction purposes only. The maximum joint fares prescribed in our orders in *Phase 4* (Order 74-12-108, as modified by Orders 75-6-60 and 75-8-126) utilize the actual segment local fares, not a hypothetical fare. While the Bureau's proposal would require the modification of the *Phase 4* order, the desirability or necessity for doing so has not been demonstrated on this record. Our reservation of jurisdiction in Order 74-12-108 gives us ample power to modify our *Phase 4* decision whenever necessary. Moreover, we would note the possibility that using a hypothetical interstate formula fare for fare construction purposes in markets where the carriers lower their fares to meet intrastate competition could result in joint fares which exceed the sum of the local fares actually charged. In such cases, a knowledgeable interline passenger could buy two tickets instead of a single joint-fare ticket, thus creating the same kind of discrimination against the unknowledgeable passenger that we found to be unjust in this proceeding.

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 7th day of July, 1976

Interstate and Intrastate Fares in
California and Texas Markets

Docket 24779

ORDER

A full public hearing having been held in Docket 24779, and the Board, having issued its opinion containing its findings and conclusions, which is attached hereto and made a part hereof,

IT IS ORDERED THAT:

1. The federally certificated air carrier parties to this proceeding, within ninety (90) days following the adoption of this order, shall establish and make effective a single level of fares for the transportation of both intrastate and interstate passengers in the intra-California and intra-Texas markets at issue, such fares to be constructed in accordance with Order 74-12-109: *Provided, however,* That said carriers may reduce such fares to meet the competition from intrastate carriers upon proper justification;

2. Order 74-12-109 be and it hereby is waived to the extent necessary for implementation of the proviso of paragraph 1 of this order;

3. The carrier parties filing tariffs pursuant to the proviso of paragraph 1 of this order shall do so on not less than 60 days' notice;

4. The Board retains jurisdiction to amend, modify, or revoke, with or without hearing, upon petition, or upon its own motion, paragraphs 1 through 3 of this order; and

5. In all other respects the investigation instituted in Docket 24779 be, and it hereby is, terminated.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

APPENDIX D

CAB Opinion and Order 76-10-138
Issued October 29, 1976

Order 1243

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 29th day of October, 1976

Interstate and Intrastate Fares in
California and Texas Markets

Docket 24779

ORDER ON RECONSIDERATION

By Order 76-7-23, decided July 7, 1976, the Board found that the differences between intrastate fares and interstate fares charged by the federally certificated carrier parties to this investigation in the intra-California and intra-Texas markets at issue were unjustly discriminatory. The Board ordered the elimination of such discrimination by requiring the establishment of a single level of fares applicable to both interstate and intrastate passengers moving in the markets at issue. The order required that new tariffs be filed on 60 days' notice within 90 days of adoption of the order. The new tariffs were to be constructed in accordance with Order 74-12-109, subject, however, to the proviso that the carriers could reduce such fares upon proper justification to meet the competition from intrastate carriers.

The time for filing petitions for reconsideration was extended to August 11, 1976, and by Order 76-8-15, August 3, 1976, the effectiveness of Order 76-7-23 was stayed until further order of the Board.

Timely petitions for reconsideration were filed by the Bureau of Economics,[1] Western Air Lines, Inc., Texas International Airlines, Inc., the National Association of Regulatory Utility Commissioners (NARUC), the People of the State of California and the California Public Utilities Commission (PUC),[2] Trans World Airlines, Inc., and Braniff Airways, Inc. Answers to these petitions were filed by United Air Lines, Inc. (supporting the Bureau), The Texas Aeronautics Commission (supporting NARUC and PUC and opposing Braniff), and Hughes Airwest (supporting the Bureau in part and opposing NARUC and the PUC in part).

Upon consideration of the petitions and the answers thereto, we find no basis either in law or policy for altering the basic conclusions or results reached in our original opinion. Except to the extent that the ensuing discussion of some of the issues raised may serve to clarify the Board's position and thereby grant relief that has been requested, we shall deny the petitions for reconsideration. We shall also terminate the stay of the effectiveness of Order 76-7-23 and provide that the new single level of fares mandated by paragraph 1 of that order be implemented within 90 days from the date of adoption of this order on reconsideration.

[1]The Bureau filed a correction to its petition.

[2]NARUC, PUC, and the People of California filed a single petition. They also petitioned the Board to file a supplemental exhibit to their petition, which they lodged with the Board in two parts, on August 23 and September 17, 1976. Their petition is granted and both of their exhibits have been considered. Thereafter, Hughes Airwest filed a motion for leave to file an unauthorized document, namely, a reply to the second part of the supplemental exhibit of PUC and NARUC. That motion is granted.

The Bureau seeks reconsideration of our decision as it relates to joint fares. Pursuant to our decision in Phase 4 of the *Domestic Passenger Fare Investigation*, the maximum lawful joint fare is based on the sum of the segment local fares over certain specified routings, minus a "terminal charge" for each interline connection.[3] Insofar as our decision would permit the carriers to lower their fares in the markets at issue to meet the competition of intrastate carriers, it could result in a reduction in joint fares which are based on those local fares. In its brief to the Board, the Bureau suggested that the effect of the Board order should be limited to the fares charged to stopover passengers and, in a footnote, proposed that in cases where the carriers lowered their local fares to meet intrastate competition, the interstate formula fares should continue to be used for constructing maximum joint fares. The Bureau also suggested that if, after the implementation of our decision a stopover fare (*i.e.*, the sum of the actual local fares) would undercut such a joint fare, the maximum joint fare should be lowered to the level of the stopover fare. We rejected this proposal since it would result in the filing of hypothetical "paper" fares for purposes of constructing the maximum joint fares. We further noted that the Bureau's proposal would require an amendment of our Phase 4 order, and found that no party had demonstrated on this record the necessity or desirability for an amendment to the Phase 4 order.[4]

The Bureau bases its petition on a claim that our decision would require reductions in joint fares resulting in significant and unwarranted dilution of carrier reve-

[3]See Orders 74-3-80 and 74-12-108.

[4]As the Bureau points out in its petition, we were incorrect in also suggesting that the Bureau's proposal could result in stopover fares which undercut through fares.

nues amounting to an estimated $11 million annually. The Bureau also notes that "paper" fares used only for construction purposes are not novel to airline tariffs. Braniff, United, and Airwest support the Bureau's petition. In addition to the revenue dilution cited by the Bureau, United claims that in instances where the intrastate fare is less than the "terminal charge," our decision could require joint fares to undercut one of the segment local fares. While both United and Airwest generally support the Bureau's specific proposal, Airwest also suggests that in instances where a local fare is less than the terminal charge, the joint fare should be set at the sum of the local fares.

We remain unpersuaded that the requested amendments to the Phase 4 order are necessary or desirable. Our Phase 4 order implements our conclusion in that proceeding that joint fares should bear the specified relationships to the local fares charged by the carriers. As a general rule, therefore, if the carriers increase their basic fares, the joint fares will also rise; likewise, reductions in local fares will trigger reductions in the maximum joint fares. The Bureau is requesting that we carve out an exception to this general rule by allowing joint fares to remain the same in the face of a reduction in local fares, on the basis that such action is needed to avoid substantial and unwarranted revenue dilution. However, since the carriers have not yet filed fare reductions to meet intrastate competitors, we believe it is premature to assess the revenue impact of those fare reductions on joint fares. Moreover, the Bureau's estimate of revenue impact is deficient in a number of respects. First, its estimate of the volume of interline traffic moving on these segments is unsupported. In addition its analysis implicitly assumes that the maximum joint fares are based on "as flown" routings over the intrastate segments shown in its analysis and that the carriers'

present joint fares are at the maximum level allowed by Phase 4. In fact, the maximum joint fare is not based on "as flown" routings (except for extremely thin markets or highly circuitous routings) but instead are based on the routing producing the lowest joint fare (generally, the most direct routing). Thus, the Bureau analysis does not demonstrate whether any of the *maximum* joint fares will in fact be altered by possible local-fare reductions in these intrastate segments. Furthermore, a large number of joint fares filed by the carriers—particularly in markets where there is a significant amount of traffic—are not filed at the maximum permissible level, but instead are filed at the single-carrier fare level. Thus, even if our action herein were to reduce the *maximum* joint fare it does not follow that the fares *actually charged* by the carriers would be affected. Accordingly, we cannot rely on the revenue impact estimated by the Bureau; indeed, it appears likely that the Bureau's analysis greatly overstates the revenue impact.

The only concrete example cited by the parties is the case of a joint fare from Knoxville to San Diego via Los Angeles. United contends that since the Los Angeles-San Diego fare ($11.34) is less than the current terminal charge ($15.74), our action would require a San Diego-Knoxville fare which would undercut the Los Angeles-Knoxville fare by $4.40. However, our Phase 4 order explicitly provides that in situations where the maximum joint fare is less than the fare to or from an intermediate point, the maximum fare shall be the fare to the higher-rated intermediate point.[5] We further point out that the carriers' current joint fare from Knoxville to San Diego is published to meet a local (single-carrier) fare in that market. That fare is $150.93, which is also the same fare charged between Knoxville and Los Angeles. Therefore, our decision would

[5]See Order 74-12-108, ordering paragraph 1.

have no impact on the San Diego-Knoxville fare whatsoever.[6]

Furthermore, as we pointed out earlier, the carriers would have to file a dual level of fares in each of these markets; a local fare which it actually charges its customers, and a hypothetical fare which presumably it would only use for purposes of constructing maximum joint fares. While the Bureau is correct in stating that such hypothetical fares are used elsewhere in the carrier's tariffs, no one disputes that this exacerbates the problem of tariff complexity.

As we indicated in our prior opinion, the Board is willing to consider amendments to our Phase 4 order whenever necessary, and indeed, the Board has amended that order twice since the termination of that proceeding.[7] However, we continue to believe that requested modifications which would have an effect on the level of fares must be supported by a detailed showing of the impact of the requested changes.[8] The information so far provided is based either on hypothetical examples or on erroneous interpretations of our Phase 4 order. If the carriers wish to pursue this modification in a petition to amend Order 74-12-108, we will expect them to show each routing to be affected, the number of passengers using each routing, the existing fare and the basis upon which that fare is constructed, the fare which would result from the proposed modification and the basis of constructing that fare, as well as any fare structure problems caused by the existing fare.

[6]It may be noted that for the 12 months ended March 31, 1975, our O&D survey (Table 12) shows only two passengers using a Knoxville-Los Angeles-San Diego interline connection.

[7]See Orders 75-6-60 and 75-8-126.

[8]See Order 75-8-126, pp. 5-6.

The issues raised by Western's petition require only brief discussion. No persuasive argument or evidence is advanced to sustain the contention that the record does not support the Board's finding of unjust discrimination. The discrimination is manifest and neither competition nor the dual regulatory structure serve as justification when both may be satisfied and the discrimination eliminated through the establishment of a single level of fares. Further, contrary to Western's contention, the Board did consider the dual regulatory structure, and Western's fears with respect to its effects (including those situations where intrastate fares may be higher than the interstate fares), are premature and speculative.[9] While it is true that the Board's action may create discrimination as between intra-California or intra-Texas markets, such discriminations will only occur where they are justified by competition, an appropriate justification in the eyes of both the Board and the courts. The continued recognition of such a justification in no way constitutes a transfer of Federal authority to the States as Western speculates may be the case.

Texas International Airlines (TXI) seeks clarification of the Board's order with respect to the length of the notice that interstate carriers will be required to provide to establish lower rates to meet intrastate competition. It also seeks the issuance of a policy statement by the Board assuring the availability to interstate carriers of "short notice" filing authority to meet intrastate competition, the reasonableness of the "short notice" to be determined on the basis of the prevailing notice requirements in the respective States. The 60 days' notice requirement in paragraph 3 of the Board's order is applicable only to lowered interstate rates established pursuant to paragraph 1 of the

[9]Obviously, however, if an intrastate carrier's fare is higher than the normal interstate fare, there is no competitive necessity for the interstate carrier to charge the higher fare. *Cf.* 14 C.F.R. § 221.165(d)(1)(iv)(*a*).

order. Because of the large number of changes that might result from the Board's order it was felt that a longer than usual period of notice should be required in the interest of an orderly transition. Once the initial changes are made, the usual 30 days' notice requirement will prevail. Of course, a 30 days' notice requirement will prevent TXI from meeting intrastate competition if that competition could change rates without limitation as to notice, which seems to be the case in Texas. Under such circumstances we would look with favor on requests for "short notice" filing authority. And we would view the notice requirements of the particular State involved as carrying great weight in our determination. However, at this early stage the Board is not prepared to arrive at a definitive view and reflect it in a published statement of policy.

The petition for reconsideration filed by NARUC, the people of the State of California, and the California PUC, and supported by the Texas Aeronautics Commission, presents no new argument not previously considered by the Board nor any compelling reason for changing our decision. The untoward results (from the point of view of the petitioners) flowing from our decision seem to be wholly speculative in nature,[10] and no workable method for eliminating the discrimination we have found has been offered.[11]

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[10]The supplemental exhibits presented by California PUC indicate the intrastate and interstate fares for the interstate carriers, as well as the fares for local carriers, and the differences involved. However, it is a matter of speculation as to the interstate carrier fare levels that will be established in various intrastate markets.

[11]Contrary to NARUC, Hughes Airwest argues that the Board can eliminate unjust discrimination in air transportation by action outside of such transportation. In support thereof it urges, rather persuasively we think, that neither the Civil Aeronautics Act of 1938 nor its presently effective successor prohibits such a course, while the Motor Carrier Act of 1935 (§ 316(e), 49 U.S.C. 316(e)) upon which the Civil Aeronautics Act was meticulously modeled in other respects, contains such a specific prohibition.

TWA's petition for reconsideration asks the Board to reconsider its decision and to permit the charging of different fares for intrastate and interstate passengers. TWA argues that the Board did not address the situation where there are no intrastate carriers offering fares below the interstate level, but where a State agency refuses to permit the federally certificated carriers to offer intrastate transportation at the interstate fares. TWA's expressed concern is with a situation which, it claims, now exists in Pennsylvania. However, the factual situation with respect to intra-Pennsylvania markets is not within the scope of this proceeding and it is not appropriate for us to attempt to decide it.

In addition to joining in the Bureau's petition for reconsideration, Braniff also asks the Board to supplement its determination that the departure from section 404(b) found in this case was prospective in operation, with explicit statements that it has not found that the fares charged by the interstate carriers over the past 25 years have been unreasonable or unjustly discriminatory, and that in fact the carriers have not been unjustly enriched. Our opinion speaks for itself. No finding of unreasonableness has been made. The finding of unjust discrimination was explicitly made prospective in operation. That determination and the accompanying discussion make it clear, as Braniff asserts, that there is no finding of unjust discrimination in the past or that the carriers have been unjustly enriched.

Braniff also contends that the Board's decision relies on an unexpected theory not focused on in the proceedings, and that the matter should, therefore, be reopened for further proceedings. In this aspect its petition was opposed by the Texas Aeronautics Commission. The Braniff contention is tantamount to a belief that the parties are entitled to the Board's views before the hearings are con-

cluded. The issues set forth in the order of investigation (Order 72-9-90) as expounded by the administrative law judge (I.D., 4-8), encompass the Board's determination here. Having decided the case on the basis that it did, there was no need for the Board to pass on other broader issues encompassed by the order of investigation but no longer necessary to a disposition of the case.

Hughes Airwest suggests that the Board specifically state, relying on the *Shreveport* doctrine, that the interstate carriers do not have to comply with State-mandated intrastate rates. We are not inclined to issue such a broad ukase in this delicate area of State-federal relationships. As Hughes Airwest suggests however, the Board does stand ready to confer with appropriate State authorities, should they so desire, as to how to secure court rulings on disputed questions without unduly prejudicing the positions of carriers finding themselves unable to comply with the conflicting orders of State and federal authorities.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petitions for reconsideration of Order 76-7-23, except to the extent granted herein, be and they hereby are denied;

2. The stay of the effectiveness of Order 76-7-23, be and it hereby is dissolved; and

3. The provisions of paragraph 1 of Order 76-7-23 shall be implemented within ninety-five (95) days following the adoption of this order on reconsideration.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

APPENDIX E

CAB Order of Investigation 72-9-90
Issued September 25, 1972

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 25th day of September, 1972

Interstate and Intrastate Fares in
California and Texas Markets

Docket 24779

ORDER OF INVESTIGATION

By complaint filed September 28, 1971, Ralph Nader and Aviation Consumer Action Project (ACAP) ask the Board to suspend and investigate the jet coach and jet commuter fares of United Air Lines, Inc. (United), applying between Los Angeles and San Francisco, California. The complainants allege that the difference between United's jet coach and jet commuter fares which are available to interstate and intrastate passengers and the differences between the interstate and intrastate fares in the Los Angeles-San Francisco market are unjustly discriminatory. Complainant Nader alleges specifically that he, while on an interstate journey, was required to pay a higher charge for air transportation than was required of intrastate passengers on the same flight between San Francisco and Los Angeles. Complainant

ACAP joins Mr. Nader on behalf of those interstate passengers who were or are discriminated against by the higher interstate fares. The complainants also request that other appropriate action be taken by the Board to initiate civil and criminal proceedings for the purpose of penalizing United for practices which violate the Federal Aviation Act of 1958 (Act).

By answer filed October 13, 1971, United contends that (a) the jet coach and jet commuter fares filed with the Board are not subject to suspension, (b) the intrastate fares of United are beyond the Board's jurisdiction, (c) even if the Board had jurisdiction over the intrastate fares of United, competition from wholly intrastate air carriers and characteristics of the Los Angeles-San Francisco market justify different fares for intrastate and interstate passengers, (d) ACAP has no standing to file an enforcement complaint because it has not shown that it is a "person" as defined in section 101(27) of the Act, and (e) the complaint requesting enforcement action was procedurally defective.

United's fares in the Los Angeles-San Francisco market are as follows:

	Interstate*	Intrastate**
Jet Coach (Y Class)	$32.41	$30.56
Jet Commuter (K Class)	$20.37	$15.28

*Airline Tariff Publishers, Inc., Tariff C.A.B. No. 136 (August 1972)

**Per complaint—Tariff not filed with Civil Aeronautics Board.

There are three preliminary matters which we shall dispose of first. With regard to the request for suspension of the interstate fares, the complaint was not timely filed. The fares complained against had been in effect since May 16, 1971, and the Board does not have the authority to suspend effective fares in interstate air transportation. Further, the complainant's allegation that United is violating

the Act because United's tariffs covering intrastate fares are not filed at the Board is untenable. United is not required to file its intrastate tariffs with the Board because transportation thereunder is not "air transportation" as defined in the Act. (See sections 403(a), 101(10), and 101(21).) The complainants' request that the Board initiate proceedings against United for violations of sections 404(b) and 411 of the Act will also be denied. The facts alleged do not warrant the initiation of an enforcement proceeding for purposes of imposing civil or criminal penalties upon United. Our disposition of the request for enforcement action makes further consideration of United's contention regarding ACAP's standing unnecessary.

As to United's contention that the Board lacks jurisdiction over its intrastate fares, we would only remark that the complaint raises significant legal and factual questions with respect to the relationship between interstate and intrastate fares that need to be resolved. The principal issue before us is whether the difference between those fares results in unjust discrimination against interstate passengers and, if so, what order should be made to correct the situation.

Fares applicable between Los Angeles and San Francisco, on the one hand, and points outside the state of California, on the other, apply in many instances not only to direct service between the points involved but also to services operated via the other California point, provided no stopover[1] is made at the other point.[2] Thus, the "interstate"

[1]Carrier tariffs define "stopover" as a deliberate interruption of a journey by the passenger, agreed to in advance by the carrier, at a point between the place of departure and the place of destination.

[2]Los Angeles, San Francisco, and other California points are common-fared by the interstate carriers with respect to many points in the eastern United States.

fares applicable between Los Angeles and San Francisco are used to construct a through fare when a stopover is made at either point enroute to the other .

It may be true that, with respect to cost of service to the carrier, a stopover passenger is little different from two local passengers[3] and that a higher fare may be justified for stopover than for through passengers. On the other hand, there would seem to be no difference, from either the passengers' or the carriers' viewpoint, between a local Los Angeles-San Francisco passenger ("intrastate") and a stopover passenger ("interstate") who receive the same service between the same points. At this stage, we are not inclined to accept, without further exploration in an evidentiary hearing, United's argument that the fare differential is justified by competition from intrastate carriers.

Since the time the complaint was filed, we have found that the same type of differentials between interstate and intrastate fares exist in numerous intra-California markets, and the differentials apply to first-class and standard-class as well as to coach and commuter (or economy) class fares. For example, the following fares are listed for various interstate carriers in the Official Airline Guide for August 1972:

Market	Fare Class	Interstate	Intrastate
Burbank-San Francisco	F	$41.67	$38.89
	Y	32.41	30.56
	K	20.37	15.74
Burbank-San Jose	F	41.67	32.41
	Y	32.41	26.00
	K	20.37	15.74
Fresno-San Francisco	F	26.85	18.00
	Y	20.37	15.00
	S	20.37	19.44
Los Angeles-Oakland	K	20.37	15.28

[3]See Order 72-4-42, dated April 10, 1972.

Market	Fare Class	Interstate	Intrastate
Los Angeles-Ontario	K	9.26	8.36
Los Angeles-Sacramento	F	44.44	33.00
	K	23.15	16.67
Los Angeles-San Diego	F	20.37	15.00
	F	20.37	11.75
	Y	16.67	9.00
	Y	16.67	8.00
	K	14.81	7.41
Los Angeles-San Francisco	F	41.67	32.00
	F	41.67	24.07
	Y	32.41	30.56
	K	20.37	15.00
	K	20.37	15.28
	S	37.96	30.56
Los Angeles-San Jose	F	41.67	32.41
	Y	32.41	30.56
	K	20.37	15.74
Oakland-San Francisco	F	14.81	9.00
	Y	11.11	9.00
Oakland-San Jose	F	14.81	13.89
	Y	11.11	10.19
Ontario-Sacramento	K	23.15	19.00
Ontario-San Francisco	F	41.67	35.00
	Y	32.41	30.56
	K	21.30	16.67
Ontario-San Jose	Y	32.41	30.56
Sacramento-San Francisco	F	19.44	13.00
	Y	15.74	11.00
	S	17.59	15.74

The questions raised by the California fare situation are not easy ones, and we believe they can best be resolved on the basis of facts adduced in the hearing which we are ordering herein. We are naming as parties to the proceeding all the interstate carriers providing interstate and intrastate service in these markets.[4] Since a situation similar to the intra-California one also exists in the following

[4]American, Continental, Delta, Hughes Airwest, National, Trans World, United, and Western.

intra-Texas markets, and the same principles are involved, we will include in the investigation fares in these markets:[5]

Market	Fare Class	Interstate	Intrastate
Dallas-Houston	F	$32.41	$25.93
	Y	25.00	24.07
	K		24.07
Dallas-San Antonio	F	34.26	25.93
	Y	25.93	25.00
	K		25.00
Houston-San Antonio	F	28.70	25.93
	Y	22.22	18.52
	K	19.44	22.22

We will expect the parties to address not only the specific issues adverted to herein but also the broader issue of the effect of such intrastate transportation generally on the interstate fare structure.

In addition, the differences between the interstate coach (or standard) and commuter (or economy) fares offered by the carriers in the intra-California markets also raise questions of discrimination, and we have decided to investigate the relation between these fares. Following are examples in addition to those previously listed:

Market	Y-Class Fare	K-Class Fare
Los Angeles-Oakland	$32.41	$20.37
Los Angeles-Sacramento	34.26	23.15
Los Angeles-San Francisco	37.96(S)	20.37
Ontario-San Jose	32.41	20.37

United has cited few, if any, real differences between coach and commuter services between Los Angeles and San Francisco.[6] According to the applicable tariffs on seating con-

[5]Additional parties will be Braniff and Texas International.

[6]United points out in its answer that coach service is currently provided only on multistop flights, wheheas commuter service is nonstop.

figurations, coach and commuter passengers may be seated in like accommodations; and the availability of family-fare discounts to coach passengers but not to commuter passengers would seem to make little difference because the commuter fare provides a greater discount from the coach fare than the 25% family fare discount available on coach service. On the other hand, it may be that the cost of operating commuter service is less than the cost of operating coach service. Any differences in the costs of commuter service should therefore be fully explored in this investigation. We do not, however, intend to relitigate here the industry average costs of coach service nor the fare structure formula which are now under investigation in Docket 21866.

Upon consideration of all relevant matters, the Board has determined that the relationships between intrastate and interstate fares in intra-California and intra-Texas markets, and between interstate coach and commuter fares in intra-California markets may be unjustly discriminatory, or unduly preferential, or unduly prejudicial, or otherwise unlawful, and should be investigated.

Accordingly, pursuant to the Federal Aviation Act of 1958, as amended, and particularly sections 204(a), 403, 404, and 1002 thereof,

IT IS ORDERED THAT:

1. An investigation is instituted to determine whether the differences between intrastate fares and interstate fares charged by the carriers listed in paragraph 4 hereof between intra-California markets and between Dallas and Houston, Dallas and San Antonio, and Houston and San Antonio, and the differences between interstate coach (or standard) class and commuter (or economy) class fares in intra-California markets, including subsequent revisions and reissues thereof, and classifications, rules, regulations,

and practices affecting such fares, or the value of service thereunder, are or will be unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and, if found to be unlawful, to determine and prescribe the lawful fares and classifications, rules, regulations, and practices;

2. Except to the extent granted herein, the complaint in Docket 23859 is hereby dismissed;

3. The proceeding ordered herein be assigned for hearing before an Administrative Law Judge of the Board at a time and place hereafter to be designated; and

4. Copies of this order shall be served upon American Airlines, Inc., Braniff Airways, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Hughes Airwest, National Airlines, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Western Air Lines, Inc., Ralph Nader, and Aviation Consumer Action Project, which are hereby made parties to this proceeding, and upon the California Public Utilities Commission and the Texas Aeronautics Commission.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

APPENDIX F

Initial Decision of Administrative Law Judge
Served April 23, 1974

United States of America
Civil Aeronautics Board
Washington, D.C.

Interstate and Intrastate Fares
In California and Texas Markets

Docket 24779

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

WILLIAM H. DAPPER

Served: April 23, 1974

Upon:

Reuben B. Robertson III, Box 19367, Washington, D.C. 20036, for Ralph Nader and Aviation Consumer Action Project.

A. Joaquin Yordan, 633 Third Avenue, New York, New York 10017, for American Airlines, Inc.

This initial decision is rendered pursuant to the authority delegated to Administrative Law Judges under Rule 27 of the Rules of Practice in Economic Proceedings. It becomes effective as the final order of the Board 30 days after service thereof unless a petition for discretionary review is filed within 21 days after service thereof in accordance with Rule 28 or the Board issues an order within said 30-day period to review upon its own initiative. If a petition for discretionary review is timely filed or action to review is taken by the Board upon its own initiative, the effectiveness of this initial decision is stayed until further order of the Board.

B. Howell Hill, Arnold & Porter, 1229-19th Street, N. W., Washington, D.C. 20036, for Braniff Airways, Inc.

James T. Lloyd, 1225-19th Street, N. W., Washington, D.C. 20036, for Continental Air Lines, Inc.

Anthony McKinnon, Delta Air Lines, Inc., Atlanta Airport, Atlanta, Georgia 30320, for Delta Air Lines, Inc.

Richard A. Fitzgerald, Hughes Airwest, San Francisco International Airport, San Francisco, California 94128, for Hughes Airwest.

Andrew T. A. Macdonald, 1666 K Street, N. W., Washington, D.C. 20006, for National Airlines, Inc.

Emory N. Ellis, Jr., 1140 Connecticut Ave., N. W., Washington, D.C. 20036, for Texas International Airlines, Inc.

George N. Kenyon, Jr., 605 Third Avenue, New York, New York 10016, for Trans World Airlines, Inc.

Richard A. Hyde, Box 66100, Chicago, Illinois 60666, for United Air Lines, Inc.

Ernest T. Kaufmann, 6060 Avion Drive, Los Angeles, California 90009, for Western Air Lines, Inc.

Theodore I. Seamon, 700 Woodward Building, Washington, D.C. 20005, for Wien Consolidated Airlines, Inc.

V. Alice Campbell, P.O. Box 3150, Beaumont, Texas 77704, for Beaumont Port Arthur Parties (Beaumont Chamber of Commerce, the Port Arthur Chamber of Commerce, the Commissioner's Court of Jefferson County, Texas).

Scott K. Carter, California State Building, San Francisco, Calif. 94102, for People of the State of California and The Public Utilities Commission of the State of California.

J. Kerwin Rooney, 66 Jack London Square, Oakland, California 94607, for Port of Oakland.

Rex H. White, Jr., P.O. Box 12548, Capitol Station, Austin, Texas 78711, for Texas Aeronautics Commission.

Paul Rodgers, 1102 ICC Building, P.O. Box 684, Washington, D.C. 20044, for National Association of Regulatory Utility Commissioners.

Lawrence R. Myers, Civil Aeronautics Board, 1825 Connecticut Ave., N. W., Washington, D.C. 20428, for the Bureau of Economics.

United States of America
Civil Aeronautics Board
Washington, D.C.

Interstate and Intrastate Fares in
California and Texas Markets

Docket 24779

The differences between the intrastate fares and the interstate fares charged by the carriers certificated by the Board between intra-California markets and between Dallas and Houston, Dallas and San Antonio, and Houston and San Antonio, are not unjustly discriminatory, unduly preferential, unduly prejudicial or otherwise unlawful.

The differences between the interstate coach (or standard) class fares and the interstate commuter (or economy) class fares offered by the interstate carriers which are parties to this investigation, for transportation between points in California result in unjust discrimination against passengers charged the local fare with the higher class of service in a given market and; accordingly, the interstate carriers are ordered to remove the differences in the published local fares by cancelling one of the two designated classes of fares in each of the markets for which a published differential exists and refraining from publishing two different local fares for the same or similar transportation services in such markets.

Appearances:

A. Joaquin Yordan, for American Airlines, Inc.

B. Howell Hill, for Braniff Airways, Inc.

James T. Lloyd, for Continental Air Lines, Inc.

Anthony McKinnon, for Delta Air Lines, Inc.

John W. Simpson and *Richard H. Fitzgerald* for Hughes Airwest.

Andrew T. A. Macdonald, for National Airlines, Inc.

Emory N. Ellis, Jr., for Texas International Airlines, Inc.

Robert P. Silverberg, for Trans World Airlines, Inc.

Richard A. Hyde, for United Air Lines, Inc.

Ernest T. Kaufmann, Howard L. Culver and *G. P. O'Grady,* for Western Air Lines, Inc.

Theodore I. Seamon, for Wien Air Alaska Airlines, Inc.

Reuben B. Robertson III, for Aviation Consumer Action Project and Ralph Nader.

V. Alice Campbell, for Beaumont Port Arthur Parties.

Scott K. Carter, for the State of California and the Public Utilities Commission of the State of California.

Sumner J. Katz, for the National Association of Regulatory Utility Commissioners.

Rex H. White, Jr., for the Texas Aeronautics Commission.

Lawrence R. Myers, for the Bureau of Economics.

TABLE OF CONTENTS

	Page No.
PRELIMINARY STATEMENT	63
ISSUES	66
DESCRIPTION OF THE MARKETS INVOLVED AND THE REGULATORY BODIES CONCERNED	69
DESCRIPTION OF THE FARES IN QUESTION	72
POSITIONS OF THE PARTIES	74
1. *Air Carrier Parties*	74
2. *Ralph Nader and ACAP*	76
3. *Beaumont-Port Arthur Parties*	76
4. *California Public Utilities Commission*	76
5. *NARUC*	76
6. *Texas Aeronautics Commission*	77
7. *Bureau of Economics*	77
FINDINGS AND CONCLUSIONS	78
THE LAWFULNESS OF THE INTERSTATE/INTRASTATE FARE DIFFERENTIAL	79
1. *Unjust Discrimination*	79
2. *Undue Preference and Undue Prejudice*	92
THE LAWFULNESS OF THE INTERSTATE COACH/INTERSTATE COMMUTER FARE DIFFERENTIAL	93
PROPOSALS TO DISMANTLE THE DUAL REGULATION SYSTEM	96
ULTIMATE CONCLUSIONS	101
ORDER	102

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM H. DAPPER

PRELIMINARY STATEMENT

This proceeding was instituted by Order 72-9-90, September 25, 1972, to determine whether the differences between the intrastate fares and the interstate fares charged by the carriers certificated by the Board between intra-California markets and in three intra-Texas markets are or will be unjustly discriminatory, unduly preferential, or unduly prejudicial, and if found to be unlawful, to determine and prescribe the lawful fares. The investigation also includes the issue of whether the differences between the interstate coach (or standard) class and the commuter (or economy) class fares charged by the carriers certificated by the Board between intra-California markets are or will be unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and, if found to be unlawful, to determine and prescribe the lawful fares.

The genesis of this investigation was a complaint filed on September 23, 1971, in Docket 23859, by Ralph Nader and the Aviation Consumer Action Project (ACAP). The complainants alleged that the differences between the jet coach and jet commuter fares charged by United Air Lines, Inc. (United) and which are available to interstate and intrastate passengers, and the differences between the interstate and intrastate fares in the Los Angeles-San Francisco market are unjustly discriminatory. The complainants sought suspension of United's interstate fares; and asked the Board to initiate civil and criminal proceedings against United for failing to file its intrastate tariffs with the Board, and for allegedly violating sections 404(b) and 411 of the Federal Aviation Act of 1958, as amended.

The Board acted on the complaint by Order 72-9-90, September 25, 1972 and concluded that it did not have the

authority to suspend effective fares in interstate air transportation; that United is not required to file its intrastate tariffs because transportation thereunder is not "air transportation" as defined in the Act; and that proceedings should not be initiated against United for violation of sections 404(b) and 411 of the Act because the facts alleged by the complainants did not warrant the initiation of an enforcement proceeding for the purpose of imposing civil or criminal penalties on United. Although, for the most part, the relief requested by the complainants was denied, the instant investigation was nonetheless instituted after the Board found that there were, in fact, differences in the interstate and intrastate fares charged by various federally certificated carriers in numerous intra-California markets, and in three intra-Texas markets. The Board noted that the principal issue is whether the difference in fares results in unjust discrimination against interstate passengers and, if so, what order should be issued to correct the situation.

The air carrier parties to this proceeding are: American Airlines, Inc. (American); Braniff Airways, Inc. (Braniff); Continental Air Lines, Inc. (Continental); Delta Air Lines, Inc. (Delta); Hughes Air Corp. (Hughes Airwest); National Airlines, Inc. (National); Texas International Airlines, Inc. (TXIA); Trans World Airlines, Inc. (TWA); United; Western Air Lines, Inc. (Western); and Wien Consolidated Airlines, Inc. (Wien).[1] The above listed air carriers (with the exception of Wien) charge or did charge an interstate and an intrastate fare in one or more of the markets in issue herein and hence were made parties to this proceeding by the order of investigation.

[1]Wien was granted leave to intervene by Order 73-5-88, May 17, 1973. Wien did not, however, submit any exhibits nor did it file an opening or reply brief.

The People of the State of California and the Public Utilities Commission of the State of California (California), the Texas Aeronautics Commission (Texas), and the National Association of Regulatory Utility Commissioners (NARUC) were granted leave to intervene by Order 73-5-88, May 17, 1973. In addition, the cities of Dallas and Ft. Worth, Texas; and the Beaumont Chamber of Commerce, Port Arthur Chamber of Commerce, Commissioners Court of Jefferson County, Texas (Beaumont-Port Arthur Parties) were granted leave to intervene by Orders 73-6-56, and 73-7-84, dated June 15, 1973 and July 17, 1973, respectively.[2] The Board's Bureau of Economics is also a party to this proceeding.

The usual procedural steps have been completed, and the hearing has been held. Opening briefs to the Administrative Law Judge were filed on December 3, 1973,[3] and reply briefs were filed on January 2, 1974.[4]

Based upon a consideration of the record and the arguments of the parties, it is concluded that the differences between the local fares charged to intrastate passengers and the local fares charged to interstate passengers by the interstate carriers which are parties to this investigation, between points in California and between Dallas and Houston, Dallas and San Antonio, and Houston and San Antonio, are not unjustly discriminatory, unduly preferential, unduly prejudicial or otherwise unlawful. On the other hand, it is concluded that the differ-

[2]The Dallas-Ft. Worth parties did not submit exhibits nor did they file an opening or reply brief.

[3]Opening briefs were filed by Braniff, Continental, Hughes Airwest, TXIA, TWA, United, Western, Ralph Nader and ACAP, California, United, NARUC, Texas, and the Bureau of Economics.

[4]Reply briefs were filed by Delta, Hughes Airwest, TWA, United, Western, the Beaumont-Port Arthur Parties, California, NARUC, Texas, and the Bureau of Economics which filed a letter in lieu of brief.

ences between the local interstate coach (or standard) and commuter (or economy) class fares charged by the interstate carriers which are parties to this investigation for transportation between points in California result in unjust discrimination against passengers charged the local fare for the higher class of service in a given market.

ISSUES

The primary issues in this proceeding, as specified by the Board in Order 72-9-90, dated September 25, 1972, are whether the differences between intrastate fares and interstate fares in intra-California markets and between Dallas and Houston, Dallas and San Antonio, and Houston and San Antonio, and the differences between interstate coach (or standard) class or commuter (or economy) class fares in the intra-California markets, including subsequent revisions and reissues thereof, and classifications, rules, regulations, and practices affecting such fares, or the value of service thereunder, are or will be unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful, and, if found to be unlawful, to determine and prescribe the lawful fares and classifications, rules, regulations, and practices.

In addition, the following subissues were identified as among those to be considered in the investigation:

1. What is the Board's jurisdiction with regard to the interstate fares and classifications, rules, regulations, and practices affecting such fares of the interstate air carriers?

2. Are the present criteria used by the carriers for determining whether a passenger is an interstate passenger or an intrastate passenger for the purpose of computing fares unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial? If so, what are the lawful criteria?

(a) What advertising and promotion of intrastate fares do the interstate carriers undertake to inform interstate passengers of such fares? Should the interstate air carriers be required to inform interstate passengers of the differences between interstate and intrastate fares and the availability thereof?

3. What are the differences, if any, in costs applicable to the transportation of interstate stopover passengers compared to intrastate passengers in the applicable markets?

4. What are the differences, if any, in costs applicable to the transportation of coach (or standard) class passengers compared to commuter (or economy) class passengers in the applicable markets?

5. If there are cost differences, are the (a) interstate/intrastate and (b) commuter (or economy)/interstate coach fare differentials reasonably related to these cost differences?

6. Do the interstate fares and intrastate fares under investigation result in charging different fares for like and contemporaneous service in the transportation of like traffic under substantially similar circumstances and conditions?

7. Are the differences between the intrastate fares and the interstate fares justified by competition, promotional considerations, value of service and/or other considerations besides differences, if any, in costs?

8. Do the coach (standard) and commuter (economy) fares under investigation result in charging different

fares for like and contemporaneous service in the transportation of like traffic under substantially similar circumstances and conditions?

9. Are the differences between the coach (or standard) class fares and the commuter (or economy) class fares justified by promotional considerations, value of service, and/or other considerations besides differences, if any, in costs?

10. What is the effect, if any, of the intrastate fares on the interstate fare structure?

11. What is the impact, if any, of the intrastate fares on the system revenues of the interstate carriers and on federal subsidy?

12. What is the impact, if any, of the intrastate fares on: (a) the level of interstate fares in the same market; (b) the level of interstate fares in other markets, including the breaking of fares?

13. If the intrastate fares of the interstate carriers are not reasonably related to differences in costs of transporting interstate and intrastate passengers, to what extent, if any, do such fares impose a burden on interstate passengers?

14. What is the effect, if any, of the commuter (or economy) fares on the movement of traffic and on revenues? What diversion, if any, from other classes of service and types of fares results from the commuter (or economy) fares?

15. If the differences between the intrastate and interstate fares are found unlawful, what corrective order should be issued by the Board?

16. If the differences between the coach (or standard) and commuter (or economy) class fares are found unlawful, what corrective order should be issued by the Board?

DESCRIPTION OF THE MARKETS INVOLVED AND THE REGULATORY BODIES CONCERNED

The fare differentials under investigation herein are a product of the system of dual regulation practiced by the California Public Utilities Commission and the Civil Aeronautics Board insofar as the State of California is concerned; and by the Texas Aeronautics Commission and the Civil Aeronautics Board insofar as the State of Texas is concerned.

It is appropriate at this point to briefly describe the jurisdiction asserted by these regulatory agencies insofar as it is pertinent herein. The Civil Aeronautics Board, of course, is the federal agency responsible for the economic regulation of civil aviation. The Board is established by and derives its authority from the Federal Aviation Act of 1958, as amended. Among other things, the interstate fares of those federally certificated carriers engaging in interstate air transportation in the States of California and Texas are subject to the jurisdiction of and the approval of the Board.[5]

The State of California through the California Public Utilities Commission exercises jurisdiction over the fares of non-federally certificated carriers operating within the borders of California (Pacific Southwest Airlines and Air California, for example). In addition, the California PUC exercises jurisdiction over the intrastate fares of federally certificated carriers within the borders of California (United and Western, for example).

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[5]One of the issues herein is whether the Board has and should exercise jurisdiction over the intrastate fares of federally certificated carriers.

In the State of Texas a somewhat different situation obtains insofar as regulation of fares is concerned. In that state, the Texas Aeronautics Commission exercises jurisdiction over the licensing of intrastate carriers; and Southwest Airlines, an intrastate operator of large equipment, was licensed in recent years by the Texas Aeronautics Commission. That Commission, however, apparently does not regulate the fares charged by the intrastate carrier or the intrastate fares charged by the federally certificated carriers. Thus in Texas, the intrastate carrier as well as the interstate carriers have been free to lower or raise their fares at will and have, in fact, done so on numerous occasions.

The markets under consideration in this case are all markets in California and Texas[6] having both interstate and intrastate fares, and all California markets having both coach and commuter interstate fares. The California markets are numerous. As the Bureau points out, Hughes Airwest which serves 24 California stations has submitted a list of over 400 markets approximately 360 of which show an interstate-intrastate fare differential. United which serves 24 California stations has submitted a list of 64 markets for which such fare differentials exist, and Western which serves 8 stations has listed 25 such fare differential markets. See *e.g.* Exhibits RW-I-1, UA-IR-1, and WA-IR-17.[7] On the other hand, American, Continental, Delta,

[6]The Texas markets are specifically identified in the order of investigation. They are: Dallas-Houston; Dallas-San Antonio; and Houston-San Antonio.

[7]The order of investigation (Order 72-9-90, September 25, 1972) sets forth some 15 California markets and shows the interstate and intrastate fares published in those markets in August 1972. Clearly, however, these are not all of the California markets under investigation herein and, in fact, the markets listed in the Board's order are designed simply to be illustrative of the type of problem involved herein.

National, and TWA provide service at only a few California stations.

The largest California market concerned is the Los Angeles-San Francisco market. The Los Angeles-San Diego market is the second largest followed by Los Angeles-Sacramento, Fresno-San Francisco, and Los Angeles-Monterey. For purposes of illustrating the nature and magnitude of the problem involved herein, the Bureau has exhibited (Exhibit BE-IR-100) a list of some 28 intra-California markets which have significance because of their size, or the length of the haul involved or because they are representative of the total number of intra-California markets in some other fashion. The first 15 markets shown on the Bureau's exhibit although not listed in order of size are, in fact, the top 15 California markets in terms of size, (based on 1972 service segment data).

The intra-California markets are served by one or more of the following interstate carriers: American, Continental, Delta, Hughes Airwest, National, TWA, United, and Western. The intra-California markets served by American, Continental, Delta, National, and TWA are not, however, significant in terms of size and numbers compared with the intra-California markets served by Hughes Airwest, Western, and United.[8]

United, Western, and TWA are the principal federally certificated carriers providing service in the Los Angeles-San Francisco market. With respect to the Los Angeles-San Diego market, American, Western, United, Delta, Hughes Airwest and National are the federally certificated carriers offering service; Western is the federally certificated carrier operating in the Los Angeles-Sacramento market; United and Hughes Airwest

[8]All schedule information herein is taken from the Official Airline Guide, March 1, 1974.